THE UNIVERSITY
of EDINBURGH

The complementarity between the Nagoya Protocol and human rights: legal implications of the principle of mutual supportiveness with respect to Indigenous peoples and local communities

Xiaoou Zheng

Submitted for the degree of Doctor of Philosophy

The University of Edinburgh

July 2019

Contents

Please note that heading and footnote numbers restart in each new chapter.

Chapter Two

Access and human rights implications for access related provisions of the Nagoya Protocol 39

Chapter Three

Benefit-sharing and human rights implications for benefit-sharing related provisions of the Nagoya Protocol 119

Chapter Four

Compliance and human rights implications for compliance related provisions of the Nagoya Protocol 193

Declaration

I declare that this thesis has been composed solely by myself and that it has not been submitted, in whole or in part, in any previous application for a degree. Except where it states otherwise by reference or acknowledgement, the work presented is entirely my own.

Xiaoou Zheng
Old College, School of Law
University of Edinburgh
10 July 2019

Abstract

This is a research project on the potential complementarity between the Nagoya Protocol and the international human rights law with respect to Indigenous peoples and local communities (IPLCs). The Nagoya Protocol is a multilateral treaty that governs issues of access to genetic resources (GR) and associated traditional knowledge (TK) and the fair and equitable sharing of benefits arising from their utilisation under the Convention on Biological Diversity (CBD). State Parties of the Nagoya Protocol are obliged to facilitate access and benefit-sharing (ABS), especially when Indigenous and local communities (ILCs) are involved and their GR and TK are at stake. Adopted in 2010 and entering into force in 2014, the Nagoya Protocol now has 123 Parties and the CBD has almost universal recognition from States. The implementation process of the Nagoya Protocol is accelerating and the impact of its ABS rules is profound and increasing, not only in shaping the behaviours and obligations of States and multinational corporations vis-à-vis ILCs, but also in understanding the dynamics and interrelations between international environmental law and other branches of international law.

Recent developments in international human rights law show a trend of integrating ABS norms into the protection of the rights of IPLCs. The ABS requirements of fair and equitable benefit-sharing and prior informed consent (PIC) are increasingly elaborated as part and parcel of IPLCs' human rights concerning their lands, natural resources, culture and TK at the UN level and by regional human rights courts and tribunals. Against this background, it is worth asking what the human rights implications are for interpreting and implementing the Nagoya Protocol, and in turn, how the Nagoya Protocol may contribute to the protection of IPLCs' human rights. For instance, what are the implications of the right of Indigenous peoples to self-determination in an ABS context? What is the connection and distinction between the

human rights norm “free, prior and informed consent” with the ABS norm PIC? Do human rights to develop and property also include an aspect of fair and equitable benefit-sharing? Does the recognition of ILCs’ customary law in the Nagoya Protocol strengthen their human right to culture? And fundamentally, how and to what extent, are State Parties of the Nagoya Protocol obliged to interpret and implement the ABS rules in accordance with international human rights law?

The principles of systemic integration and mutual supportiveness provide the theoretical framework of this thesis. As emerging principles of international law, they require different branches of international law to be interpreted and implemented in a systemic and mutually supportive manner. The value of these principles manifests in situations where there is conflict between norms derived from different fields of international law. Furthermore, the principle of mutual supportiveness speaks beyond interpretative matters—as demonstrated in the thesis, this principle could also shed light on the law-making processes when efforts at reconciling competing rules have been exhausted, as well as implementation challenges at both international and domestic levels. Essentially, this theoretical approach is underpinned by the perspective that international law is a dynamic, complex and interconnected system in which norms operate and evolve interdependently. Particularly, ABS and human rights should not and cannot be isolated from one another for achieving their respective objectives.

Based on a range of international treaties and “soft” instruments, the practices of the UN, international treaty bodies, courts and tribunals, and relevant scholarly debates, this research provides a pragmatic account of the implications of the principles of systemic integration and mutual supportiveness in understanding the complementarity between the Nagoya Protocol and international human rights law.

Abbreviations

ABS	Access and Benefit-Sharing
CBD	Convention on Biological Diversity
CERD	Committee on the Elimination of Racial Discrimination
COP	Conference of the Parties
COP-MOP	Conference of the Parties Serving as the Meeting of the Parties
FAO	Food and Agriculture Organization of the United Nations
FPIC	Free Prior Informed Consent
GR	Genetic Resources
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILCs	Indigenous and Local Communities
ILO	International Labour Organization
IPLCs	Indigenous Peoples and Local Communities
IPRs	Intellectual Property Rights
MAT	Mutually Agreed Terms
PIC	Prior Informed Consent
TK	Traditional Knowledge
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNPFII	United Nations Permanent Forum on Indigenous Issues

Table of Cases

1. International Court of Justice

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [28 May 1951] Rep 15.

Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) [5 February 1970] Rep 6.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [21 June 1971] Rep 16.

Western Sahara (Advisory Opinion) [16 October 1975] Rep 12.

Aegean Sea Continental Shelf Case (Greece v Turkey) [19 September 1978] Rep 62.

Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) [12 November 1991] Rep 53.

Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad) [3 February 1994] Rep 6.

Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) [15 February 1995] Rep 112.

Case Concerning East Timor (Portugal v Australia) [30 June 1995] Rep 90.

Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) [25 September 1997] Rep 7.

Case Concerning Oil Platforms (Iran v United States of America) [6 November 2003] Rep 803.

Case Concerning Oil Platforms (Separate Opinion of Judge Higgins) [6 November 2003] Rep 803.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [9 July 2004] Rep 136.

Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua) [13 July 2009] ICGJ 421.

2. Permanent Court of International Justice

S.S. "Wimbledon" (United Kingdom, France, Italy & Japan v Germany) [17 August 1923] Series A No. 1.

3. Human Rights Committee

Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v Mauritius [09 April 1981] UN Doc CCPR/C/12/D/35/1978.

Sandra Lovelace v Canada [30 July 1981] UN Doc. CCPR/C/13/D/24/1977.

B. d. B. et al. v. The Netherlands [30 March 1989] UN Doc A/44/40.

Lubicon Lake Band v Canada [26 March 1990] UN Doc Supp. No. 40 (A/45/40).

Toonen v Australia [31 March 1994] UN Doc CCPR/C/50/D/488/1992.

Länsman et al v Finland [26 October 1994] UN Doc CCPR/C/52/D/511/1992 (1994).

Jouni E. Länsman et al. v Finland [30 October 1996] UN Doc CCPR/C/58/D/671/1995 (1996).

John Wilson v Australia [1 April 2004] UN Doc CCPR/C/80/D/1239/2004 (2004).

Poma Poma v Peru [24 April 2009] UN Doc CCPR/C/95/D/1457/2006.

Paadar v Finland [5 June 2014] UN Doc CCPR/C/110/D/2102/2011.

4. African Commission on Human and Peoples' Rights

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya [2010] 276/2003.

5. African Court on Human and Peoples' Rights

African Commission on Human and Peoples' Rights v Republic of Kenya [26 May 2017] App No 006/2012.

6. Inter-American Commission on Human Rights

Merits Report No. 27/98 [1998] OEA/Ser/L/V/II.98 Doc. 35.

7. Inter-American Court on Human Rights

The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75), Inter-American Commission on Human Rights Advisory Opinion [24 September 1982] IACHR Series A no 2.

Aloeboetoe v Suriname [10 September 1993] IACHR Series C no 15.

Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua [31 August 2001] IACHR Series C no 79.

Case of the Yakye Axa Indigenous Community v Paraguay [17 June 2005] IACHR Series C no 125.

Case of the Sawhoyamaxa Indigenous Community v Paraguay [29 March 2006] IACHR Series C No 146.

Case of the Saramaka People v Suriname [28 November 2007] IACHR Series C no 172.

Case of Kaliña and Lokono Peoples v Suriname [25 November 2015] IACHR Series C no 309.

8. European Commission of Human Rights

Austria v Italy [11 January 1961] APP No. 788/60.

9. European Court of Human Rights

Case of Al-Adsani v The United Kingdom [21 November 2001] 34 EHRR 273.

10. World Trade Organisation

United States - Standards for Reformulated and Conventional Gasoline [20 May 1996] WT/DS2/10.

United States - Import Prohibition of Certain Shrimp and Shrimp Products [1998] WT/DS58/R.

European Communities - Approval and Marketing of Biotech Products [29 September 2006] WT/DS291/R; WT/DS292/R; WT/DS292/R.

Table of Instruments

1. International Instruments

1.1 Treaties

Charter of the United Nations [signed 26 June 1945] 1 UNTS XVI.

Statute of the International Court of Justice [18 April 1946] 33 UNTS 993.

International Convention on the Elimination of All Forms of Racial Discrimination [adopted 21 December 1965, entered into force 4 January 1969].

Vienna Convention on the Law of Treaties [adopted 23 May 1969, entered into force 27 January 1980] 1155 UNTS 331.

International Covenant on Civil and Political Rights [adopted 16 December 1966, entered into force 3 January 1976] 999 UNTS 171.

Optional Protocol to the International Covenant on Civil and Political Rights [adopted 19 December 1966, entered into force 23 March 1976] 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights [adopted 16 December 1966, entered into force 3 January 1976] 993 UNTS 3.

Convention on the Elimination of All Forms of Discrimination against Women [adopted 18 December 1979, entered into force 3 September 1981] 1249 UNTS 13.

Convention on International Access to Justice [adopted 25 October 1980, entered into force 1 May 1988] HCCH Publications 29.

Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries [adopted 27 June 1989, entered into force 5 September 1991] ILO C169.

Convention on Biological Diversity [adopted 5 June 1992, entered into force 29 December 1993] 1760 UNTS 79.

Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade [adopted 10 September 1998, entered into force 24 February 2004] 2244 UNTS 337.

Cartagena Protocol on Biosafety [adopted 29 January 2000, entered into force 11 September 2003] CBD COP 1 Decision EM-I/3.

International Treaty on Plant Genetic Resources for Food and Agriculture [adopted 3 November 2001, entered into force 29 June 2004] 2400 UNTS.

Convention on the Protection and Promotion of the Diversity of Cultural Expressions [adopted 20 October 2005, entered into force18 March 2007] 2440 UNTS 311.

Convention on the Rights of Persons with Disabilities [adopted 24 January 2007, entered into force 3 May 2008] UNGA Res 61/106.

Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization [adopted 29 October 2010, entered into force 12 October 2014] CBD COP Decision 10/1.

1.2 General Comments/General Recommendations

CEDAW General Recommendation No. 19: Violence against Women' (1992) UN Doc A/47/38.

CEDAW General Recommendation No. 28 on the Core Obligations of States parties under Article 2 of the Convention' (16 December 2010) UN Doc CEDAW/C/GC/28.

CERD General Recommendation No. 21: Right to Self-determination' (1996) UN Doc A/51/18.

CERD General Recommendation No. 23: Indigenous Peoples' (1997) UN Doc A/52/18.

CESCR General Comment No. 3: The Nature of States Parties' Obligations' (14 December 1990) UN Doc E/1991/23.

CESCR General Comment No. 21: Right of Everyone to Take Part in Cultural Life' (21 December 2009) UN Doc E/C.12/GC/21.

CCPR General Comment No.12: Article 1 The Right to Self-determination of Peoples' (13 March 1984) UN Doc HRI/GEN/1/Rev.9 (Vol. II).

CCPR General Comment No.18: Non-discrimination' (10 November 1989) UN Doc HRI/GEN/1/Rev.9 (Vol. I).

CCPR General Comment No. 23: Article 27 (Rights of Minorities)' (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5.

CCPR General Comment No. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights' (5 November 2008) UN Doc CCPR/C/GC/33.

1.3 UN Resolutions/Declarations

Universal Declaration of Human Rights [10 December 1948] UNGA Res 217 A (III).

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief [25 November 1981] UNGA Res 36/55.

Declaration on the Right to Development [4 December 1986] UNGA Res A/RES/41/128.

Rio Declaration on Environment and Development [12 August 1992] UN Doc A/CONF.151/26 (Vol. I).

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities [18 December 1992] UNGA Res 47/135.

United Nations Declaration on the Rights of Indigenous Peoples [13 December 2007] UNGA Res 61/295.

United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas [28 September 2018] UNGA Res 39/21.

1.4 Guidelines and other “Soft” instruments

'Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization ' (27 May 2002) UN Doc UNEP/CBD/COP/6/20.

Akwé: Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities' (13 April 2004) UN Doc UNEP/CBD/COP/DEC/VII/16.

Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters' (26 February 2010) Decision SS.XI/5.

The Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities' (29 October 2010) UN Doc UNEP/CBD/COP/DEC/X/42.

Mo'otz Kuxtal Voluntary Guidelines for the Development of Mechanisms, Legislation or other Appropriate Initiatives to Ensure the "Prior and Informed Consent", "Free, Prior and Informed Consent" or "Approval and Involvement", depending on National Circumstances, of Indigenous Peoples and Local Communities for Accessing their Knowledge, Innovations and Practices, for Fair and Equitable Sharing of Benefits arising from the Use of their Knowledge, Innovations and Practices relevant for the Conservation and Sustainable use of Biological Diversity, and for Reporting and Preventing Unlawful Appropriation of Traditional Knowledge' (17 December 2016) UN Doc CBD/COP/DEC/XIII/18.

Rutzolijirisaxik Voluntary Guidelines for the Repatriation of Traditional Knowledge of Indigenous Peoples and Local Communities Relevant for the Conservation and Sustainable Use of Biological Diversity' (30 November 2018) UN Doc CBD/COP/DEC/14/12.

2. Regional and Domestic Instruments

European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 [adopted 4 November 1950, entered into force 3 September 1953] ETS 5.

Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms [adopted 20 March 1952, entered into force 3 September 1952] 213 UNTS 262.

African Charter on Human and Peoples' Rights [adopted 27 June 1981, entered into force 21 October 1986] 1520 UNTS 217.

American Convention on Human Rights, "Pact of San Jose", Costa Rica [adopted 22 November 1969, entered into force 18 July 1978] 1144 UNTS 123.

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [adopted 25 June 1998, entered into force 30 October 2001].

Regulation (EU) No 511/2014 of the European Parliament and of the Council of 16 April 2014 on Compliance Measures for Users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union [2014] OJ L 150/59.

Gesetz zur Umsetzung der Verpflichtungen nach dem Nagoya-Protokoll, zur Durchführung der Verordnung (EU) Nr. 511/2014 und zur Änderung des Patentgesetzes sowie zur Änderung des Umweltauditgesetzes [2015] (DE).

Décret n° 2017-848 du 9 mai 2017 Relatif à L'accès aux Ressources Génétiques et aux Connaissances Traditionnelles associées et au Partage des Avantages Découlant de leur Utilisation [2017] (FR).

Biological Diversity Act [2002] (IN).

Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations [2014] (IN).

Biodiversity Act [2004] (SA).

Regulations on Bio-Prospecting, Access and Benefit-Sharing [2008] (SA).

Law of the People's Republic of China on Regional National Autonomy [2001] (CH).

Constitution of the People's Republic of China [2018] (CH).

Acknowledgement

The process of writing a PhD thesis has challenged and redefined my methods of thinking and changed me in many other profound ways too. I consider myself being extremely lucky— to have the opportunity of researching on a topic that never fails to interest (sometimes surprise) me, and to have met so many dear people who have generously offered me help, guidance and criticism. It is impossible to thank everyone in this acknowledgment but I shall try my best.

First and foremost, I would like to express my gratitude to my supervisors, Professor Elisa Morgera and Dr. Michelle Burgis-Kasthala, without whose knowledge, mentoring and unparalleled expertise in their respective fields my attempt of this project would be impossible. I am in great debt to them for their time and patience of reading through my various drafts and providing invaluable and always timely feedbacks and comments. I would also like to thank my doctoral thesis examiners, Professor James Harrison and Professor Jérémie Gilbert, without whose insightful comments my thesis, especially some key arguments, would have been much poorer.

I am also greatly indebted to all the professors, scholars, practitioners and fellow academics I met during this PhD journey, who at various stages offered me important advices and help. Individual thanks should be made to: Professor Lihong Gao, my first professor on environmental law and the role model responsible for implanting a long-lasting passion for this field in my heart; Ms Maria Julia Oliva, a professional practitioner of environmental law and international law, who has taught me a great deal about execution and efficiency, leadership and teamwork, diligence, focus and much more beyond.

This PhD thesis would not be possible without the generous help of the Chinese Scholarship Council, the Hague Academy of International Law and various small

funds provided by the University of Edinburgh. They have greatly supported my academic work by allowing me to concentrate on my research without worrying about the financial cost of spending much of my time and energy thinking and writing. They have also provided me with opportunities to participate in various conferences and summers schools and get in touch with the wider academic community.

Last but not least, thanks to my dearest Edinburgh friends—Dani, Dawoon, Himani, Ke, Laurence, Lucas, Margherita, Nicolas, Pablo, Jiahong, Johan, Jonas, Qingxiang, Wenlong, Xinxiang, Zhaoye (my apology for being unable to mention every person), who have lovingly shared with me warmth when it was cold and light when it was dark. Also, thanks to my childhood friends who have supported me regardless of the geographical distances. Most importantly I shall thank my family, whose unconditional love has companied every and each minute of bad and good of this PhD journey, and to whom this work is dedicated with the most profound gratitude.

Chapter One

Introduction

Hoodia, a flowering plant native to Southern Africa, has been used by the San people as a hunger suppressant for centuries when hunting or going on long trips in the Kalahari Desert. This traditional practice attracted attention from a South African research institution in the 1960s, who successfully isolated the active molecule from the plant in 1996 and gained a patent on it. The work resulted in a collaboration between the institution and two pharmaceutical companies with a commercialisation plan to promote Hoodia as an appetite-suppressant and anti-obesity drug. The market, especially in the United States and the United Kingdom, responded with a roaring trade on Hoodia products. The San people, on the other hand, has been fighting for a fair share of the commercial benefits and recognition of the ownership over Hoodia ever since.[1] Similarly, a Dutch company, based on a benefit-sharing agreement with Ethiopia in 2005 for using Teff, an ancient Ethiopian grain, obtained two patents for processing Teff in 2007. Instead of receiving the promised benefits, Ethiopia was left empty-handed as the company declared bankruptcy in 2009, even though Teff was quickly gaining popularity as a superfood in the European market. Ethiopia also lost its rights to utilise its own Teff genetic resources as the patents remained valid in many European countries.[2]

[1] Roger Chennells and Rachel P. Wynberg, 'Green Diamonds of the South: An Overview of the San-Hoodia Case' in Roger Chennells, Doris Schroeder and Rachel P. Wynberg (eds), *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia case* (Springer 2009) 89 and Daniel F. Robinson, *Confronting Biopiracy: Challenges, Cases and International Debates* (Earthscan 2010) 61.

[2] These two patents remained valid until 2019, see discussion in the next paragraph and also Regine Andersen and Tone Winge, *The Access and Benefit-Sharing Agreement on Teff Genetic Resources: Facts and Lessons* (Fridtjof Nansen Institute, 2012) 7 <http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Pulications/FNI/FNI-R0612.pdf> accessed 09/07/2018.

Scholars including Shiva, Wynberg, Ikechi and Drahos have portrayed the landscape of these on-going appropriations by powerful companies in developed countries of the world's genetic resources and traditional knowledge from various perspectives.[3] Cases concern many biological resources that are well known: from potatoes to Basmati rice, from Enola beans to Soy beans, from quinine to Maca to Rooibos tea and the list could go on and on. Not only that these cases have been internationally criticised as "biopiracy" on an ethnic basis, but also are increasingly outlawed by the recent legal developments at both international and national levels.[4] For instance, South Africa adopted the Biodiversity Act in 2004 and its implementing regulation on bioprospecting, access and benefit sharing in 2008, which recognise and protect the rights of the providers of Indigenous biological resources and associated traditional knowledge and require the users to obtain permits and share benefits.[5] Moreover, in February 2019, a court in the Netherlands has ruled that the Dutch patents for processing Teff are null and void, against the background that the European Union has adopted a regulation on access and benefit-sharing in 2014.[6]

Indeed, marked by the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization[7] (Nagoya Protocol) in 2010 and its entering into force in 2014, many

[3] Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (South End Press 1999) 5, Roger Chennells, Doris Schroeder and Rachel P. Wynberg (eds), *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia Case* (Springer 2009) 3, Mgbeoji Ikechi, *Global Biopiracy: Patents, Plants, and Indigenous Knowledge* (UBC Press 2005) 9 and Peter Drahos, *Intellectual Property, Indigenous People and their Knowledge* (Cambridge University Press 2014) 138.

[4] Biopiracy means "the practice of commercially exploiting naturally occurring biochemical or genetic material, especially by obtaining patents that restrict its future use, while failing to pay fair compensation to the community from which it originates" see Oxford English Dictionary, *"biopiracy, n."* (Oxford University Press).

[5] Biodiversity Act [2004] (SA) and Regulations on Bio-Prospecting, Access and Benefit-Sharing [2008] (SA).

[6] Information available at Rechtbank Den Haag, 'Uitspraken' (*Rechtbank Den Haag*, 07/12/2018) <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2018:13960> accessed 08/05/2019.

[7] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization [adopted 29 October 2010, entered into force 12 October 2014] CBD Decision 10/1.

countries have started the process of taking legislative and policy measures to regulate access to and benefit-sharing (ABS) of genetic resources (GR) and associated traditional knowledge (TK). This international ABS framework envisaged by the Convention on Biological Diversity (CBD)[8] and its Nagoya Protocol is founded on the recognition of States' sovereign rights over their natural resources, but also explicitly requires respect for the participatory rights of Indigenous and local communities (ILCs) and their customary laws in ABS transactions. As the Nagoya Protocol focuses on GR and TK, it inevitably interlinks and interacts with norms and rules regulating lands and natural resources, intellectual property, as well as issues of Indigenous and traditional ownership over such resources and knowledge, and more broadly their cultural identity and ways of life. The intricacies of these interrelations between the Nagoya Protocol and other branches of international law generate contested concepts, diverse contexts and complex practices for interpreting and implementing the Nagoya Protocol at both inter-State and intra-State levels.[9]

Focusing on Indigenous peoples and local communities (IPLCs)[10] and their rights pertaining to GR and TK, this thesis examines the Nagoya Protocol and its implication from a human rights perspective. This is because scholarly attention on the particular interface between ABS law and human rights law is scarce, especially compared to the academic work attributed to the legal interaction between ABS law and IPRs law.[11] Nevertheless, the connection between ABS and human rights is

[8] Convention on Biological Diversity [adopted 5 June 1992, entered into force 29 December 1993] 1760 UNTS 79.

[9] See essays in Evanson C. Kamau and Gerd Winter (eds), *Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit Sharing* vol 19 (Routledge 2009) 3 and Sebastian Oberthür and G. Kristin Rosendal (eds), *Global Governance of Genetic Resources: Access and Benefit Sharing after the Nagoya Protocol* (Routledge 2014) 1.

[10] The following section 1.2 will clarify the use of the terminology "IPLCs" and "ILCs" in. In general, this thesis treats these two terms interchangeably.

[11] See, for instance, Graham Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge* (Earthscan 2004) 3, Drahos (n 3) 108 and Johanna Gibson, *Community Resources: Intellectual Property, International Trade, and Protection of Traditional Knowledge* (Routledge 2016) 185.

important and increasingly recognised, in not only scholarly debates,[12] but also the UN human rights machinery and international and regional human rights case law.[13] Indeed, one fundamental premise of this research is that the Nagoya Protocol and human rights law should not be isolated from one another for protecting IPLCs and their rights over GR and TK. The overarching objectives of safeguarding human dignity[14] and pursuing equity and fairness requires a holistic and systemic approach to integrate human rights standards into the process of interpreting and implementing the Nagoya Protocol. In this mind-set, this research intends to provide a pragmatic account of the human rights implications for the Nagoya Protocol. It aims to investigate to what extent a mutually supportive interpretation, that is, to understand the provisions of the Nagoya Protocol in light of relevant international human rights law, may shed light on the persisting normative uncertainties and practical challenges in applying the ABS rules, especially in Indigenous and local contexts.[15] This chapter introduces the context, key international instruments and doctrinal methodology of the thesis and offers an overview of the research questions and the structure in which they are investigated.

[12] See Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (2016) 27 (2) European Journal Of International Law, 355 and Jérémie Gilbert, *Natural Resources and Human Rights: An Appraisal* (First edn, Oxford University Press 2018) 80.

[13] An overview of the human rights context, including international instruments, case law and the UN human rights treaties bodies, will be provided in the following section 2.1.2. Detailed discussion of these cases and jurisprudential interpretation is provided in later chapters, for instance, in section 3 of chapter two and section 2 of chapter three.

[14] For a thorough discussion about the interrelation between human dignity and international law see Stephen Riley, *Human Dignity and Law: Legal and Philosophical Investigations* (Routledge 2018) 101.

[15] See the discussion in sections 1 and 2 of chapter two, section 1 of chapter three and sections 1 and 2 of chapter four.

1. Nagoya Protocol and the international ABS framework

1.1 History, legal status and the rationale of the CBD and its Nagoya Protocol

Opened for signature at the Rio Earth Summit in 1992 and entered into force in December 1993, the CBD is dedicated to the conservation of biodiversity, sustainable use of the components of biodiversity and fair and equitable sharing of the benefits arising out of the utilisation of GR.[16] Fundamentally, the CBD recognises States' sovereign rights over their natural resources, which determines that access to such resources is subject to States' domestic laws and regulations.[17] To implement the third objective of "fair and equitable benefit-sharing", the CBD requires Parties to facilitate access to GR and take measures to ensure benefit-sharing based on prior informed consent (PIC) and mutually agreed terms (MAT).[18] Significantly, it also requires Parties to "respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities" and encourages "equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices".[19] The Nagoya Protocol was adopted in 2010 under the CBD and entered into force in 2014. It aims to substantiate the ABS provisions of the CBD by elaborating obligations with respect to access, utilisation and fair and equitable benefit-sharing of GR and associated TK, including those held by ILCs. In a nutshell, Parties of the Nagoya Protocol are obliged to establish appropriate legislative, administrative or policy measures to ensure that PIC is obtained for access and that MAT are negotiated for fair and equitable benefit-sharing with the provider countries of the GR, and/or the ILCs who hold GR and associated TK. Meanwhile, the provider countries are entitled to regulate access and receive agreed benefits generated from the utilisation of their

[16] CBD, art 1.

[17] ibid art 15(1).

[18] ibid art 15.

[19] ibid art 8(j).

GR and associated TK. To date, the CBD has nearly universal recognition in the world with 196 Parties.[20] The Nagoya Protocol has 120 Parties and 3 countries that have ratified the Protocol but are not yet Parties.[21] Thus, an international ABS framework regulating GR and TK associated with such resources is in place. It is worth noting that ABS agreements have been seen in a number of different international legal regimes, including those regulating GR for food and agriculture,[22] marine GR[23] and TK-related IPRs.[24] As a matter of scope, the "international ABS framework" as referred to in this thesis does not include ABS provisions of those other regimes. It considers specifically a treaty-based framework envisaged by the CBD and the Nagoya Protocol. In reality, both Parties and non-Party States are implementing the ABS principles and rules of the Nagoya Protocol at the national level to varying degrees according to different domestic circumstances.[25] This process relies on and facilitates

[20] Only two member States of the United Nations are not Parties to the CBD: United States of America and the Holy See, information available at CBD, 'List of Parties' (*CBD*, 1992) <https://www.cbd.int/information/parties.shtml> accessed 03/03/2019.

[21] Information available at CBD, 'Access and Benefit-Sharing Clearing-House' (*CBD*, 2014) < https://absch.cbd.int/> accessed 17/12/2019.

[22] The binding instrument is the International Treaty on Plant Genetic Resources for Food and Agriculture [adopted 3 November 2001, entered into force 29 June 2004] 2400 UNTS 303. For scholarly discussion see Claudio Chiarolla, Sélim Louafi and Marie Schloen, 'An Analysis of the Relationship between the Nagoya Protocol and Instruments related to Genetic Resources for Food and Agriculture and Farmers' Rights' in Elisa Morgera, Matthias Buck and Elsa Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2012) 83.

[23] Under the UN, the discussion of a binding instrument regulating marine GR is ongoing, see UNGA Res 72/249, 'International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction' (19 January 2018) UN Doc A/RES/72/249. For scholarly discussion see Petra Drankier and others, 'Marine Genetic Resources in Areas beyond National Jurisdiction: Access and Benefit-Sharing' (2012) 27 (2) The International Journal of Marine and Coastal Law, 375.

[24] The binding instrument is the Agreement on Trade-Related Aspects of Intellectual Property Rights [adopted 15 April 1994, entered into force 1 January 1995] WTO. For scholarly discussion see Daniel J. Gervais, 'Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach' (2005) Michigan State Law Review, 138.

[25] For example, Brazil is not yet a Party to the Nagoya Protocol but it has a comprehensive national legal framework on ABS, see CBD, 'Country Profiles: Brazil' (*CBD*, 2014) <https://absch.cbd.int/countries/BR> accessed 03/03/2019.

transnational partnership among States' authorities, public institutions, private sectors and ILCs in accessing and utilising GR and TK.[26]

The need for such an ABS framework emerges from the rapid advancements in the field of bioscience and technology. Research and development (R&D) of genetic components of biological resources has empowered broad application of these resources in various industrial sectors such as pharmaceutics, botanical medicines, food and cosmetics.[27] The growing realisation and prospects of the economic value of GR thus encourage institutions and companies from developed countries to search for novel compounds derived from plant and animal species, often from developing countries with rich biodiversity.[28] In the past few decades, large-scale bioprospecting and commercial exploitation of GR without fair compensation to its original holders has triggered increasing legal and political concerns worldwide. Successful commercialisation and patents of GR and associated TK, such as San Hoodia, yellow Enola beans and Basmati rice, are criticised as "biopiracy". They directly prompted the international regulatory discussion of a fair and equitable solution for accessing and utilising GR and associated TK.[29] Furthermore, the principle of equity demands fair distribution of benefits among those who have created, managed and developed the concerned GR and associated TK.[30] Thus, as developing countries call for the

[26] Tomme R. Young, 'An International Cooperation Perspective on the Implementation of the Nagoya Protocol' in Elisa Morgera, Matthias Buck and Elsa Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013) 457 and Elisa Morgera, Elsa Tsioumani and Matthias Buck, *Unraveling the Nagoya Protocol: A Commentary on the Nagoya Protocol on Access and Benefit-sharing to the Convention on Biological Diversity* (Brill 2014) 2.

[27] Kerry Ten Kate and Sarah A. Laird, *The Commercial Use of Biodiversity: Access to Genetic Resources and Benefit-sharing* (Earthscan 2002) 1.

[28] Sarah A. Laird and Rachel P. Wynberg, 'CBD Factsheet' (*CBD*, 2012) 1 <https://www.cbd.int/abs/doc/protocol/factsheets/policy/ABSFactSheets-Overview-web.pdf> accessed 14/03/2019.

[29] Robinson (n 1) 3 and Ikechi (n 3) 119.

[30] Thomas Greiber and others, *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing* (IUCN 2012) 83.

recognition of their sovereign control over living and inanimate natural resources, an ABS mechanism is proposed under the CBD framework.[31] It is designated to provide biodiversity-rich countries and communities with economic incentives and financial support in order to achieve global goals of biodiversity conservation and sustainable use of its components.[32] Not without controversies and compromises among key State actors, the Nagoya Protocol was finally adopted after lengthy negotiation in Japan in October 2010.[33]

1.2 Linkages between the Nagoya Protocol and human rights

The concept of ABS is not only articulated under the CBD framework, but also increasingly incorporated in a number of other international legal frameworks, including sustainable development, intellectual property and most importantly, human rights.[34] This reflects the multi-faceted nature of ABS issues. In particular, an ABS issue is often a human rights issue when ILCs are concerned. For instance, access to GR and associated TK requires identifying legitimate right-holders of certain natural resources and TK (right to natural resources); the notorious biopiracy cases are not only economically unfair to ILCs, but may also have adverse impacts on ILCs' traditional way of life and economic practices (right to development); and to negotiate a fair and equitable benefit-sharing agreements requires consultation with ILCs and respect for their customary laws and community protocols (right to culture). Furthermore, the Nagoya Protocol and the human rights law share a similar set of legal

[31] Morten W. Tvedt and Tomme R. Young, *Beyond Access: Exploring Implementation of the Fair and Equitable Sharing Commitment in the CBD* (IUCN 2007) 1.

[32] See Greiber and others (n 30) 83 and Kate and Laird (n 27) 75.

[33] Linda Wallbott, Franziska Wolff and Justyna Pozarowska, 'The Negotiations of the Nagoya Protocol: Issues, Coalitions and Process' in Sebastian Oberthür and G. Kristin Rosendal (eds), *Global Governance of Genetic Resources: Access and Benefit sharing after the Nagoya Protocol* (Routledge 2014) 33.

[34] Charles Lawson, *Regulating Genetic Resources: Access and Benefit Sharing in International Law* (Edward Elgar 2012) 240.

tools to deal with these issues. For instance, PIC as established by the Nagoya Protocol is a way to ensure ILCs' control over their GR or TK, which explicitly overlaps with the procedural requirement of free, prior, informed consent (FPIC) in fulfilling ILCs' participatory human rights pertaining to lands, natural resources and development.[35] Another example is the requirement of the Nagoya Protocol to respect ILCs' customary laws and community protocols in ABS transactions, which echoes the obligations imposed by the ILCs' human right to culture and self-determination. These examples indicate that the Nagoya Protocol and international human rights law share certain normative ground when it concerns the issue of protecting the rights of ILCs especially regarding their natural resources and TK.[36] As a logical consequence, the realisation of the rights of ILCs in one context could be complementary and mutually supportive to the realisation of the rights established in the other. This shared normative ground and the hypothesis of a mutually supportive interpretation and implementation are unpacked and investigated in the following chapters in detail.

States play an imperative role in implementing international norms and fulfilling international obligations with respect to ILCs. The political willingness, economic and legal capacities of States to implement the international standards and cooperate with other States may vary dramatically hence the outcome of the transposition of internationally agreed norms into domestic and local contexts. Based on multilateral treaties and the recognition of States' sovereign rights, both the Nagoya Protocol and international human rights law need to deal with the margin of State discretion as they implement their international obligations.[37] It is no longer

[35] Annalisa Savaresi, 'The International Human Rights Law Implications of the Nagoya Protocol' in Elisa Morgera, Matthias Buck and Elsa Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-Sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013) 53.

[36] ibid and Morgera, Tsioumani and Buck (n 26) 117.

[37] Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli and others (eds), *International Human Rights Law* (Third edn, Oxford University Press 2018) 97.

controversial that contemporary sovereignty is by no means absolute, but redefined by global challenges, such as biodiversity conservation and sustainable development, and restrained by human rights obligations. This consensus requires States to cooperate for the good of the international community and to balance their sovereign rights and duties.[38] For instance, the CBD proclaims that the conservation of biodiversity is a "common concern of humankind".[39] According to the International Court of Justice (ICJ), some human rights obligations are established as binding *erga omnes*— owned "towards the international community as a whole" and "by their nature, are the concern of all States".[40] Furthermore, although natural resources are subject to States' sovereign rights, Parties to the CBD and the Nagoya Protocol are frequently called upon to, *inter alia*, facilitate the ILCs in their capacity-developing, enhance ILCs' participation in the decision-making process and develop "culturally appropriate processes" to benefit-sharing.[41] In the human rights context, States bear obligations to not only refrain from interfering, so that the rights of individuals and groups are respected, but also to safeguard and facilitate, so that their rights are protected and fulfilled.[42] States also play an increasing role in regulating relations and behaviours in private arenas in order to make sure that the non-State actors are in compliance with the human rights standards too.[43] States' obligation, therefore, could be a helpful entry

[38] Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997) 368 and Patricia W. Birnie, Alan E. Boyle and Catherine Redgwell, *International Law and the Environment* (Third edn, Oxford University Press 2009) 192.

[39] CBD, pmbl.

[40] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [5 February 1970] (ICJ) Rep 6 para 33. For a detailed discussion on the collective nature of the obligations under the Nagoya Protocol and the human rights law, see section 3.2.1 of chapter four.

[41] CBD Working Group on Article 8(j), 'Participatory Mechanisms for Indigenous and Local Communities' (27 November 2001) UN Doc UNEP/CBD/WG8J/2/4 para 73 and CBD COP Decision XIII/18, 'Article 8(j) and related Provisions' (17 December 2016) UN Doc CBD/COP/DEC/XIII/18 para 17.

[42] Mégret (n 37) 97.

[43] Jacob Katz Cogan, 'The Regulatory Turn in International Law' (2011) 52 (2) Harvard international law journal, 324.

point to examine the human rights implication in the ABS context of the Nagoya Protocol. A key premise is that by taking into account States' human rights obligations while implementing ABS rules, States could fulfil their obligations imposed by both international laws in a synergetic manner vis-à-vis ILCs. Furthermore, since the international ABS framework and human rights law are based on multilateral treaties, it is also feasible to compare and contrast their compliance mechanisms and the ways State Parties are held accountable in cases of violations, which is a point scrutinised in chapter four.

These connections provide the legal foundation for considering the Nagoya Protocol in light of international human rights law. Essentially, the dynamics of ABS and human rights issues require an approach to interpretation and implementation that could adequately reflect and address their legal complexity and interrelations. Since the adoption of the CBD, a "rights-based approach" to achieve the objectives of the CBD has been increasingly discussed by legal scholars.[44] Morgera and Tsioumani explicitly link human rights to intra-State benefit-sharing with ILCs in an ABS context in 2010.[45] The need for a mutually supportive interpretation between the ABS framework and the international human rights law has since been discussed, especially with respect to Indigenous peoples and a wide range of their human rights including the right of self-determination, development, culture, science and so on.[46] Human

[44] See Rosemary J. Coombe, 'Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity' (1998) 6 (1) Indiana journal of global legal studies and Jessica Campese and others (eds), *Rights-based Approaches: Exploring Issues and Opportunities for Conservation* (CIFOR and IUCN 2009) 47.

[45] Elisa Morgera and Elsa Tsioumani, 'The Evolution of Benefit Sharing: Linking Biodiversity and Community Livelihoods' (2010) 19 (2) Review of European Community & International Environmental Law, 167.

[46] See various comments in Morgera, Tsioumani and Buck (n 26) 35, Savaresi (n 35) 58,Elisa Morgera, 'Fair and Equitable Benefit-Sharing at the Cross-Roads of the Human Right to Science and International Biodiversity Law' (2015) 4 (4) Laws, 803 and Elisa Morgera, 'Under the Radar: Fair and Equitable Benefit-sharing and the Human Rights of Indigenous Peoples and Local Communities related to Natural Resources' (2019) (Online) International Journal of Human Rights, 2.

rights issues in the ABS context also have attracted attention at the UN level. For instance, the Permanent Forum on Indigenous Issues (PFII)—the high-level advisory body to the UN Economic and Social Council—has commissioned a study on the Nagoya Protocol and its influences to the human rights of Indigenous peoples.[47] Within the CBD, the Conference of Parties (COP) decides in 2018 that safeguards in biodiversity financing mechanisms should take into account relevant international agreements, including, *inter alia*, international human rights treaties and the UNDRIP.[48] In 2018, the UN Special Rapporteur on human rights and the environment Mr. John H. Knox proposes 16 principles relating to human rights and the environment, which explicitly includes benefit-sharing.[49]

This bird's-eye view of the linkages between the Nagoya Protocol and the international human rights law will be unpacked in greater detail and depth in the subsequent chapters. The value of integrating international human rights law is to structure a doctrinal framework for systemically understanding, implementing and questioning the normative and practical dimensions of the ABS principles and procedures. On the other hand, exploring the ABS implications in a human rights context may also inform the understanding and implementation of specific human rights pertaining to ILCs and their rights over GR and TK. The aspiration is that such a complementary approach could contribute to ensuring that the interpretation and implementation of the Nagoya Protocol fully respect international human rights standards and *vise versa*. In this mind-set, the next sections firstly clarify the key notions of ILCs and "Indigenous peoples and local communities" (IPLCs) and their

[47] Permanent Forum on Indigenous Issues, 'Nagoya Protocol: Substantive and Procedural Injustices relating to Indigenous Peoples' Human Rights' (16 May 2011) 1.

[48] CBD COP Decision 14/15, 'Safeguards in Biodiversity Financing Mechanisms' (30 November 2018) UN Doc CBD/COP/DEC/14/15 3.

[49] Human Rights Council, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (24 January 2018) UN Doc A/HRC/37/59 18.

respective controversies. It then establishes the theoretical basis for a mutually supportive interpretation of the Nagoya Protocol and relevant international human rights law, namely, the principle of systemic integration and mutual supportiveness. Finally, I ask the research questions and explain the structure of the thesis.

2. Indigenous peoples and local communities

2.1 Setting the stage: who are they?

As discussed, the CBD and the Nagoya Protocol have explicitly recognised the role and rights of ILCs as the "custodians of biodiversity" in the context of biodiversity conservation, sustainable use of biological resources and fair and equitable benefit-sharing.[50] Over time, the CBD Parties have also elaborated that the notion of "ILCs" contains essentially two groups: "Indigenous peoples" and "local communities embodying traditional lifestyles", although these terms are subject to intense political and legal controversies and conceptual ambiguities.[51] Before moving on to discuss the legal implications attached to these terms by international law, it is helpful to establish a general understanding of who these peoples and/or communities are.

According to a range of UN documents, the approximate Indigenous population worldwide nowadays is somewhere between 300 million to 400 million, representing over 5000 ethnic groups and constituting 6% of the world's population.[52]

---

[50] Nagoya Protocol, pmbl. See also Manuel Ruiz and Ronnie Vernooy (eds), *The Custodians of Biodiversity: Sharing Access and Benefits to Genetic Resources* (Earthscan 2012).

[51] CBD COP Decision XII/12, 'Article 8(j) and related Provisions' (13 October 2014) UN Doc UNEP/CBD/COP/DEC/XII/12 section F.

[52] See Manuela Tomei, *Indigenous and Tribal Peoples: An Ethnic Audit of Selected Poverty Reduction Strategy Papers* (International Labour Organization 2005) 1, PFII, *Who are Indigenous Peoples?* (UN PFII, 21 October 2007) 1 <https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf> accessed 11/03/2018.and Rodolfo Stavenhagen, *Indigenous Peoples in Comparative Perspective* (United Nations Development Programme, 2004) 1 <http://hdr.undp.org/sites/default/files/hdr2004_rodolfo_stavenhagen.pdf> accessed 04/05/2018.

Many of these peoples and communities have become familiar with the public: the San in the Kalahari Desert, the Inuit of the Arctic regions, the Sami reindeer herders in Norway, the Yanomami hunters in the Amazon rainforest, the Tibetan mountain people of China, the Maoris of New Zealand, the Cree, the Maya, the Mapuche, the Maasai, and so it goes on and on.[53] Many of them had suffered in the age of colonialism with their lands brutally claimed, people slaughtered and property taken.[54] Many still face severe risks of marginalisation, assimilation and dispossession of lands, territories, and resources today.[55] Currently, different countries have taken different approaches to recognise and protect the rights of such peoples and communities, in which their identities (as "peoples", "minorities" or "communities") have been established to varying degrees and in different forms.[56] Nevertheless, over millennia, these peoples and communities have developed significant knowledge about flora and fauna taxonomy and usage, gathering, hunting and cultivating skills, and management of a variety of ecosystems. Such knowledge forms and shapes their distinctive identities and is an integral part of their Indigenous and local cultures. The imperative role of Indigenous peoples and local communities (IPLCs) in safeguarding the world's remaining biological and cultural diversity is now widely recognised.[57] Their TK and

---

[53] Julian Burger, *The Gaia Atlas of First peoples: A Future for the Indigenous World* (Robertson McCarta 1990) 180.

[54] Kenneth Coates, *A Global History of Indigenous Peoples: Struggle and Survival* (Palgrave Macmillan 2004) 18, Julian Burger, *Report from the Frontier: The State of the World's Indigenous Peoples* (Zed 1987) 36 and Dee Brown, *Bury My Heart at Wounded Knee: An Indian history of the American West* (Holt Rinehart & Winston 1971) 1.

[55] In August 2017, for example, more than 100 Maasai huts in Tanzania were reported to have been burned down near the Serengeti National Park, with hundreds of Indigenous Maasai people evicted at gunpoint, see BBC, 'Maasai Displaced after Huts Burned in Tanzania' (*BBC*, 16 August 2017) <http://www.bbc.co.uk/news/world-africa-40950383> accessed 08/11/2018. In general, see Colin Samson, *Indigenous Peoples and Colonialism: Global Perspectives* (Polity Press 2017) 148 and Gillette H. Hall and Harry A. Patrinos, 'Introduction' in Gillette H. Hall and Harry A. Patrinos (eds), *Indigenous Peoples, Poverty and Development* (Cambridge University Press 2012) 2.

[56] For detailed discussion about different national approaches to IPLCs see section 3.3 of chapter two.

[57] The linkage between cultural and biological diversity is recognised in the 1992 Global Biodiversity Strategy promulgated by World Resources Institute (WRI), The World Conservation Union (IUCN) and United Nations Environment Programme (UNEP). For an anthropologic study on the subject, see Luisa Maffi, 'Linguistic, Cultural

traditional practices also inspire innovative solutions for modern agriculture,[58] pharmacology,[59] sustainable management of local ecosystems and resources.[60]

2.2 From ILCs to IPLCs: an overview of the development under the CBD framework

ILCs are recognised as holders and providers of GR and TK in the CBD and the Nagoya Protocol; therefore, are entitled to issue PIC, negotiate benefit-sharing terms and receive agreed benefits.[61] However, the term "ILCs" is not defined under the CBD framework, nor it is self-explanatory. It is generally accepted that self-identification is the most appropriate way to establish who may be Indigenous and/or local communities, although the practical effects of the ABS rules may largely depend on national recognition of these identities and implementation of the ABS measures.[62] Since 2010, the United Nations Permanent Forum on Indigenous Issues (UNPFII) has been calling on CBD Parties to adopt the terminology 'Indigenous peoples and local

---

and Biological Diversity' (2005) 34 Annual Review of Anthropology and Lj Gorenflo and others, 'Co-occurrence of Linguistic and Biological Diversity in Biodiversity Hotspots and High Biodiversity Wilderness Areas' (2012) 109 (21) Proceedings of the National Academy of Sciences of the United States of America.

[58] M. Kat Anderson, *Tending the Wild: Native American Knowledge and the Management of California's Natural Resources* (First edn, University of California Press 2005) 309 and Miguel A. Altieri, 'Linking Ecologists and Traditional Farmers in the Search for Sustainable Agriculture' (2004) 2 Frontiers in Ecology and the Environment, 35.

[59] Ababacar Maiga and others, 'A Survey of Toxic Plants on the Market in the District of Bamako, Mali: Traditional Knowledge Compared with a Literature Search of Modern Pharmacology and Toxicology' (2005) 96 (1) Journal of Ethnopharmacology and Richard Evans Schultes, 'Reasons for Ethnobotanical Conservation' in Robert E Johannes (ed), *Traditional Ecological Knowledge: A Collection of Essays* (IUCN 1989) 31.

[60] See Andre Lalonde, 'African Indigenous Knowledge and its Relevance to Sustainable Development' in Julian T Inglis (ed), *Traditional Ecological Knowledge: Concepts and Cases* (International Program on Traditional Ecological Knowledge and IDRC 1993) 55 and K. P. Laladhas, Preetha Nilayangode and Oommen V. Oommen (eds), *Biodiversity for Sustainable Development* (Springer 2017) 165.

[61] Nagoya Protocol, arts 5(2) 5(5) 6(2) and 7.

[62] CBD Expert Group Meeting of Local Community Representatives, 'Guidance for the Discussions concerning Local Communities within the Context of the Convention on Biological Diversity' (7 July 2011) UN Doc UNEP/CBD/AHEG/LCR/1/2 para 7.

communities' in order to better reflect the international human rights development especially with respect to Indigenous peoples. [63] In 2014, in response to the increasing pressure of UNPFII's demand, the CBD Parties agreed that the term "IPLCs" would be used in their future decisions and secondary documents as appropriate. [64] However, as will be discussed in greater detail in the section 1.2.2 of chapter three, I observe that this acknowledge of terminological change is essentially a sleight of hand played by the CBD Parties, in the sense that they have rejected almost all the legal implications that might be derived therefrom.[65]

The reluctance, if not a complete refusal, of the CBD Parties to fully acknowledge and embrace human rights achievements with respect to IPLCs concerning GR and TK has its reasons. Fundamentally, "Indigenous peoples" is recognised and established by international law as a distinct legal subject.[66] Even though the debate on the exact nature and scope of the rights of Indigenous peoples is ongoing, the general existence of their rights is uncontroversial.[67] For instance, their rights of self-determination and the rights with respect to their lands, territories and natural resources.[68] The 2007 United Nations Declaration on the Rights of Indigenous

[63] UNPFII, "Report on the ninth session" (19–30 April 2010) UN Doc E/2010/43– E/C.19/2010/15.

[64] CBD COP Decision XI/14, 'Article 8(j) and related Provisions' (5 December 2012) UN Doc UNEP/CBD/COP/DEC/XI/14 sec G para 2.

[65] The CBD decision only accepted the term "IPLCs" on an exceptional basis, see discussion in section 1.2.2 of chapter three.

[66] Russel Lawrence Barsh, 'Indigenous Peoples in the 1990s: From Object to Subject of International Law?' (1994) 7 Harvard Human Rights Journal, 33 and Benedict Kingsbury, '"Indigenous Peoples" in International Law: a Constructivist Approach to the Asian Controversy' (1998) 92 (3) American journal of international law, 414.

[67] See, *inter alia*, Kingsbury (n 66) 414, Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (First edn, Oxford University Press 2016) and G. Pentassuglia, *Minorities in International Law: An Introductory Study* (Council of Europe Pub. 2002) 23.

[68] Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People' (19 July 2010) UN Doc A/HRC/15/37 para 76 to 78. Allen Buchanan, 'Role of Collective Rights in the Theory of Indigenous Peoples' Rights' (1993) 3 (1) Transnational Law & Contemporary Problems, 93.

Peoples (UNDRIP) is widely accepted as a significant milestone for addressing Indigenous peoples' claims and establishing their rights[69]. At the international level, there has cumulated numerous interpretations of general human rights standards "in a manner favourable to indigenous claims" by international treaty bodies,[70] robust regional judicial standards on indigenous rights[71] and the establishment of several UN mechanisms for promoting indigenous rights.[72] Importantly, the Nagoya Protocol notes in its Preamble the importance of the UNDRIP and affirms that nothing in the Protocol "shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities". Thus, it is reasonable to suggests that the Nagoya Protocol recognises the existence of indigenous rights and suggests that the interpretation and implementation of this Protocol shall be in line with the requirements of these rights.[73] Admittedly, as will be discussed in various sections in this thesis, the Nagoya Protocol does not incorporate the language of human rights *per se* and the margin left for States' discretion on the issue of protecting IPLCs' human rights is considerable.

In comparison, "local communities" remains a notion much less well-defined by international law. The CBD was the first international framework which has called upon the global community to pay attention to the essential role played by local

[69] For a collection of analysis of the Declaration, see Steve Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart 2011).

[70] Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10 (1) Melbourne Journal of International Law. Also see the detailed analysis of HRC' interpretation in Section 3.1.

[71] Luis Rodríguez-Pinero, 'The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Bloomsbury Publishing 2011) 457.

[72] They include, for instance, the Expert Mechanism on the Rights of Indigenous Peoples, the UNPFII, and the Special Rapporteur mechanism addressing situations of the human rights and fundamental freedoms of Indigenous peoples.

[73] Kabir Bavikatte and Daniel F. Robinson, 'Towards a Peoples History of the Law: Biocultural Jurisprudence and the Nagoya protocol on Access and Benefit Sharing' (2011) 7 (1) Law, Environment and Development Journal, 46.

communities with respect to biodiversity conservation and established their rights in fair and equitable benefit-sharing. The CBD Parties have also accepted a "potentially useful" list of key characteristics of local communities,[74] including, *inter alia,* their right to self-identification, traditional lifestyle, definable territory and existence of customary rule.[75] As will be discussed in the following section, the work of recognising and protecting of the rights of local communities in international human rights law has only started to accelerated in the past few years. The lack of legal sources on "local communities" as a legal subject in international law makes it more difficult to establish their rights and corelated States' responsibilities than Indigenous peoples.

2.3 Indigenous peoples and local communities in international human rights law

From a historic perspective, since Indigenous peoples firstly encountered the European explorers over approximately 500 years ago,[76] international law has undergone a fundamental change with respect to its treatment of IPLCs. Overall, it has evolved, perhaps rather "grudgingly and imperfectly",[77] from an instrument to facilitate colonialism before the 20th century to recognise and protect IPLCs' rights in the 20th and 21st centuries.[78] The most significant development is the emergence of "human rights" in the international legal system. Specifically, under the UN framework,

---

[74] XI/14 (n 64) para 19.

[75] CBD Working Group on Article 8(j), 'Report of the Expert Group Meeting of Local Community Representatives within the Context of Article 8(j) and Related Provisions of the Convention on Biological Diversity' (4 September 2011) UN Doc UNEP/CBD/WG8J/7/8/Add.1* anx. Morgera has pointed out that the characteristics of local communities indeed have much in common with Indigenous peoples, see Morgera (n 46) 3.

[76] Catherine J. Iorns Magallanes, 'International Human Rights and Their Impact on Domestic Law on Indigenous Peoples' Rights in Australia, Canada, and New Zealand' in Paul Havemann (ed), *Indigenous Peoples' Rights in Australia, Canada & New Zealand* (Oxford University Press 1999) 235.

[77] S. James Anaya, *Indigenous Peoples in International Law* (Second edn, Oxford University Press 2004) 5.

[78] Siegfried Wiessner, 'Rights and Status of Indigenous peoples: A Global Comparative and International Legal Analysis' (1999) 12 Harvard Human Rights Journal, 98. Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press 2010) 141.

important human rights instruments have been negotiated and adopted. These include the Charter of the United Nations in 1945, the Universal Declaration of Human Rights in 1948, the UN Convention on the Prevention and Punishment of the Crime of Genocide in 1951, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1965,[79] the International Covenant on Civil and Political Rights (ICCPR)[80] and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966. These instruments affirm fundamental human rights and dignity to all human persons and some specifies the rights of "peoples" and/or "minorities" to varying degrees.[81] In particular, advocates of IPLCs have often used Article 27 of ICCPR to claim their cultural rights as "minorities" within States.[82] These instruments contain not only human rights obligations for State Parties, but in many cases *erga omnes* obligations that apply to all States.[83] Magallanes has argued that from the 1950s to 1970s, the prevailing ideology of international law was still positivist and that the new focus on human rights did not significantly influence the rights of IPLCs in international and national contexts.[84] Nevertheless, human rights concepts have become the basis of contemporary international law, as demonstrated by the UN Charter, that the purpose of the UN is based on the principle of "equal rights and self-determination of peoples".[85] In the context of the International Labour

[79] International Convention on the Elimination of All Forms of Racial Discrimination [adopted 21 December 1965, entered into force 4 January 1969].

[80] International Covenant on Civil and Political Rights [adopted 16 December 1966, entered into force 3 January 1976] 999 UNTS 171, art 7.

[81] For instance, the ICCPR and the ICESCR affirm peoples' right of self-determination. Moreover, the ICCPR specifies protection of minorities' right to practice their culture. ibid arts 2 and 27.

[82] Engle (n 78) 141.

[83] See Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford University Press 2000) 1 and Stefan Kadelbach, 'Jus Cogens, Obligations Erga Omnes and Other Rules - the Identification of Fundamental Norms' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Brill 2005) 21.

[84] For instance, only States can become members of the UN and States determine what laws were legally binding upon themselves. Magallanes (n 76) 237.

[85] Charter of the United Nations [signed 26 June 1945] 1 UNTS XVI, art 1(2).

Organization (ILO) and other UN agencies, such as the Food and Agriculture Organisation of the United Nations (FAO) and World Health Organisation (WHO), the rights of IPLCs also started to enter their organisational policies and agendas. For instance, the ILO firstly articulates concerns about the plight of native labour in 1921 and adopts the ILO Convention No. 107 on the Protection and Integration of Indigenous, Tribal and Semi-tribal Populations in Independent Countries (ILO Convention 107) in 1957, which has established a rather integrative and assimilationist framework to address the protection of IPLCs.[86] Furthermore, the ILO and the FAO, WHO and other UN agencies have initiated the Andean Indian Programme to facilitate development and help integrate the estimated 10 million Indians living in isolated areas of the Andes Mountains into the national communities —mainly Bolivia, Ecuador and Peru—to which they belong.[87]

However, it was not until the 1970s that international human rights law rejected the assimilationist approach of its earlier standards and started to establish the rights of IPLCs as distinct peoples and communities with their own cultural identity.[88] Under the UN framework, the UN Human Rights Commission set up the Working Group on Indigenous Populations,[89] which promoted the drafting work that eventually led to the adoption of the landmark UNDRIP in 2007. Special systems of the UN human rights machinery also include the special rapporteur on Indigenous issues and a permanent forum for Indigenous peoples to participate in the UN structure. A legal breakthrough was the decision of the ICJ in the *Western Sahara* case in 1975. The court held that

---

86 For a thorough study on the ILO Conventions and the "fall of integration", see Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919-1989)* (Oxford University Press 2005) 215.

87 See Jef Rens, 'The Development of The Andean Indian Programme and Its Future' (1964) 18 (104) Ekistics, 29.

88 Magallanes (n 76) 238.

89 The absence of the term "peoples" was because States were threatened by its statistic overtones, see Catherine J. Iorns, 'Indigenous Peoples and Self-Determination: Challenging State Sovereignty' (1992) 24 (2) Case Western Reserve Journal of International Law, 251.

the Indigenous inhabitants of the Western Sahara were entitled to self-determination and rejected the principle of *terra nullius* under the laws and principles of decolonisation.[90] In 1989, the ILO adopts Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169), revising its previous Convention 107 and in particular its assimilationist approach. The ILO Convention 169 reflects much of the discussion that had took place in the UN context, confirming the international obligations of States to safeguard Indigenous peoples' rights of cultural self-determination, participation and rights to lands and resources.[91] However, to date, the ILO Convention 169 only has 23 State Parties.[92] Began in 1980s, international and regional human rights courts and tribunals have been established to ensure compliance of international human rights, which are further complemented by various domestic enforcement measures.[93] With respect to local communities, the UN Human Rights Council recently adopted the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, which broadens the understanding of "local communities" in the sense that it also includes rural groups, such as small-scale farmers, artisanal fishing communities, island and mountain communities.[94] This Declaration also recognises a wide range of rights of local communities regarding, *inter alia*, land and other natural resources,[95] a safe, clean and healthy environment,[96]

---

[90] *Western Sahara (Advisory Opinion)* [16 October 1975] (ICJ) Rep 12 para 79.

91 Anaya (n 77) 58.

92 ILO, 'Ratifications of C169' (1991) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314> accessed 08/04/2019.

[93] For a detailed discussion of various regional and national approaches to establishing courts commission and tribunals for IPLCs, see Arthur J. Ray, *Aboriginal Rights Claims and the Making and Remaking of History* (McGill-Queen's University Press 2016) 242 and Ben Saul, *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* (Hart Publishing 2016) 54.

[94] United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas [28 September 2018] HRC A/HRC/RES/39/12.

[95] ibid art 17.

[96] ibid art 18.

right to biological diversity[97] and cultural rights and traditional knowledge.[98] In general, due to the lack of legal sources for addressing concerns and rights of local communities, it might be difficult to establish States' obligations to protect local communities in an ABS context to the same level as Indigenous peoples.[99]

This thesis focuses on the jurisprudence developed by UN human rights treaty bodies, the ICJ, and regional human rights courts and tribunals in interpreting the international human rights standards in specific circumstances vis-à-vis IPLCs. The term "jurisprudence" is deployed in a liberal sense, as many of these bodies are not courts *per se*. For instance, the "General Comments", "Concluding Observations" on States' periodic reports and the "views" expressed in individual communications provided by the UN human rights treaties bodies are not strictly binding in law. Nevertheless, they are generally regarded as highly authoritative interpretations of international human rights standards and States' human rights obligations, both at a standard-setting level and in the resolution of particular disputes in individual cases.[100] I also examine the jurisprudential interpretation provided by regional human rights courts and tribunals, in which the rights of IPLCs have been most prominently elaborated, especially with respect to lands, resources and culture as well as procedural elements such as FPIC and benefit-sharing.[101] These include, *inter alia*, 2007

[97] ibid art 20.

[98] ibid art 26.

[99] Greiber and others (n 30) 91.

[100] HRC, 'CCPR General Comment No. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights' (5 November 2008) UN Doc CCPR/C/GC/33 para 11. See Saul (n 93) 2 and Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6 (1) Human Rights Law Review, 32.

[101] Detailed discussion of these cases will be provided in each following chapter with different focus on IPLCs' rights in the contexts of access, benefit-sharing and compliance respectively.

Saramaka case[102] and 2015 *Kaliña and Lokono* case[103] of the Inter-American Court of Human Rights and the 2010 *Endorois* case[104] of the African Commission on Human and Peoples' Rights.

To conclude, the contemporary international human rights law recognises the rights of IPLCs and it has become the dominant rubric for pursuing the rights of IPLCs and addressing the "historic injustices" they had suffered.[105] Admittedly, human rights norms and their national compliance are far from satisfactory—one only needs to look at Rohingya people in Myanmar and Maasai people in Tanzania to realise that the most fundamental human rights, after half an century's establishment, are still facing severe threats and in deep political turmoil. In scholarly discussion, the difference between human rights terms relating to IPLCs, such as Indigenous peoples and minorities, also remains a controversial matter.[106] Anaya, Kymlicka, Kingsbury and others have written extensively on the differences and tensions between Indigenous rights and minority rights, collective rights and individual rights, including their respective theoretical and normative grounds.[107] Their work in general reveals that the "rights" accorded to Indigenous peoples and minority groups by international law are far from

[102] *Case of the Saramaka People v Suriname* [28 November 2007] (Inter-American Court of Human Rights) IACHR Series C no 172.

[103] *Case of Kaliña and Lokono Peoples v Suriname* [25 November 2015] (Inter-American Court of Human Rights) IACHR Series C no 309.

[104] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* [2010] (ACHPR) 276/2003.

[105] Anaya (n 77) 66 and Engle (n 78) 46. For reference to "historic injustices", see United Nations Declaration on the Rights of Indigenous Peoples [13 December 2007] UNGA Res 61/295, pmbl.

[106] The following section 2.1.2 provides a detailed discussion about IPLCs in the history and contemporary development of international law.

[107] Anaya and Kingsbury tackle the subject from an international legal perspective while Kymlicka addresses the cultural distinctiveness from a political-theorist perspective. See Anaya (n 77) 3, S. James Anaya and James E. Rogers, *International Human Rights and Indigenous Peoples* (Aspen Publishers 2009) 15, Kingsbury (n 66) 414, Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon 1995) 7 and Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press 2007) 27.

"perfect" as normative conceptions and meanwhile face divergent political ramifications.[108] However, in the rich literature about how IPLCs and ILCs should be regarded by modern international law, it is not difficult to identify an overarching theme of recognising and respecting cultural pluralism and fundamental human rights such as the rights of lands, natural resource and self-determination of these peoples and communities.[109] Furthermore, this legal development translates into States' human rights obligations and the commitments of State Parties to introduce measures for domestic compliance and adaptions for domestic policies would have far-reaching consequences.[110] Thus, acknowledging the normative and practical gap in establishing

[108] For instance, "Indigenous peoples" is not defined and the tension between their collective rights and individual rights are not satisfactorily solved, e.g. how to deal with oppressive traditions within a community that might violate individual human rights. For more discussion, see the following section 2.1.2 and section 2.1 of chapter three. See also essays in Allen and Xanthaki (n 69) 1.

[109] The right of self-determination often refers to internal self-determination instead of external self-determination that concerns secession or forming of independent States. Detailed discussion is provided in section 3.1 of chapter two. Generally see, Anaya and Rogers (n 107), Wiktor Osiatyński, *Human Rights and Their Limits* (Cambridge University Press 2009) 88, Rhiannon Morgan, *Transforming Law and Institution: Indigenous Peoples, the United Nations and Human Rights* (Ashgate 2011) 117, Rachel Sieder (ed), *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (Palgrave Macmillan 2002) 1 and Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (n 107) 88.

[110] In scholarly debate, contemporary human rights are often categorised into "generations". Specifically, the obligations of States to abstain from interference in order to respect human rights, for instance, the right to freedom, are related to the first generation of human rights (negative duties). States' obligations to accommodate and facilitate the realisation of human rights, for instance, the right to food, health and development, especially in social and economic contexts. These rights are related to the second generation of human rights (positive duties). Since the 1980s, human rights have undergone a normative reform of "solidarity", often considered as the third generation of human rights, predetermined by the prevailing global issues such as world peace, sustainable development and biodiversity conservation and resulted in the debate of some rather controversial "collective human rights". See, *inter alia*, Stephen P. Marks, 'Emerging Human Rights: A New Generation for the 1980s?' (1981) 33 (2) Rutgers Law Review, 441, Philip Alston, 'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?' (1982) 29 (3) Netherlands International Law Review, 307, Quincy Wright, 'Relationship Between Different Categories of Human Rights' in UNESCO (ed), *Human Rights: Comments and Interpretations* (A. Wingate 1949) 147, Human Rights Council, 'Human Rights and International Solidarity' (7 February 2007) UN Doc A/HRC/4/8 paras 41-45, Cindy L. Holder and Jeff J. Corntassel, 'Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights' (2002) 24 (1) Human Rights

key notions of ILCs and IPLCs in both the ABS and human rights contexts, this thesis attempts to explore and elaborate the potential synergies and complementariness between the Nagoya Protocol and human rights law. The argumentation is built upon a theoretical framework of the principles of systemic integration and mutual supportiveness, which will be explained in the following sections. Essentially, I focus on the extent to which by applying the principle of systemic integration and mutual supportiveness this gap might be bridged and the limitation this approach faces both in terms of treaty interpretation and implementation.

3. Theoretical framework: systemic integration and mutual supportiveness

3.1 The principle of systemic integration

After the Second World War, the process and the work of international law-making witnessed a rapid and substantial expansion and growth.[111] Treaties that were mostly bilateral and addressing issues of diplomatic relations and trade, have become multilateral and regulating a wide range of subjects from environment, health to labour rights.[112] This transforming process has resulted in a significant proliferation of international norms and an increasing concern about the fragmentation of international law.[113] Against this background, the rules on interpretation, as enshrined in the Articles

Quarterly, 127 and Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press 2014) 136.

[111] James Leslie Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Sixth edn, Oxford University Press 1981) 58.

[112] Dinah Shelton, 'International Law and 'Relative Normativity'' in Malcolm D Evans (ed), *International Law* (Fourth edn, Oxford University Press 2014) 139.

[113] See generally, Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge University Press 2003), Georges Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1999) 31 (4) New York University Journal of International Law and Politics, 919 and

31-33 of the 1969 Vienna Convention on the Law of Treaties (VCLT), have received a great amount of scholarly attention.[114] Amongst them, the Article 31(3)(c) of VCLT provides that when interpreting a treaty, "(t)here shall be taken into account, together with the context... (c) Any relevant rules of international law applicable in the relations between the parties". This provision enables interpreters to read treaty norms in light of relevant sources stemming from both general and special international law in a broad and inter-temporal framework.[115] Indeed, the debates surrounding Article 31(3)(c) has proved the necessity and the value of perceiving international law as "a normative system and a process rather than as rules".[116] In numerous cases, the ICJ has established the way individual treaties and rules should be interpreted: that they are by no means mechanistic or static, but rather should "be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation".[117] In this line of thinking, McLachlan has suggested that Article 31(3)(c) codifies a general principle of systemic integration, which implies that the treaties that govern particular subject matter are all part of the international law system; therefore, must be "applied and interpreted against the background of the general

---

Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 (3) Leiden Journal of International Law, 554.

[114] Various international courts and tribunals have unwaveringly held that Articles 31-33 are customary international law, see, *inter alia*, *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* [12 November 1991] (ICJ) Rep 53 para 48, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* [15 February 1995] (ICJ) Rep 112 para 33, *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [3 February 1994] (ICJ) Rep 6 para 41, *Case Concerning Oil Platforms (Iran v United States of America) [6 November 2003] (ICJ) Rep 803 para 23 and more cases see* Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: a Commentary* (Springer 2012) 523.

[115] Vassilis Tzevelekos, 'The Use of Article 31(3) of the VCLT in the Case Law of the ECtHR: an Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?—Between Evolution and Systemic Integration' (2010) 31 (3) Michigan Journal of International Law 635.

[116] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 8.

[117] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [21 June 1971] (ICJ) Rep 16 32-33 and *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [25 September 1997] (ICJ) Rep 7 68.

principles of international law".[118] As per treaty interpretation, this thesis is based on the principle of systemic integration, specifically as required by Article 31(3)(c), that "any relevant rules of international law applicable in the relations between Parties" shall be taken into account for interpretation. In order to fully unveil the implication of this principle with respect to the Nagoya Protocol and relevant international human rights law, as well as the difficulties such an attempt of integration faces, it is necessary to clarify two key concepts of Article 31(3)(c), namely, "relevant rules" and "parties".

Defining what are the "relevant rules" is crucial, as not all the rules would have a role for application in the context of Article 31(3)(c).[119] The ordinary meaning of "relevant rules" of international law refers to those touching on the same subject matter as the treaty provision or interpreted provisions or which in any way affect that interpretation.[120] In light of the principle of systemic integration, McNair has argued that since all the rules are part of the international legal system, they are all relevant to the background of international law albeit limited in their respective scope and subject matters.[121] This approach of interpretation manifests in the separate opinion of Judge Higgins on *Oil Platforms* case, in which Article 31(3)(c) provides a legal basis for bridging a bilateral treaty governing Iran-United States relations and the principles of customary international law that are considered as "relevant rules".[122] Similarly, in the *US-Shrimp* case,[123] the WTO Appellate Body referred to Article 56 of the UNCLOS in support of the interpretation of a general term "natural resources" as it reckoned that, the task of the tribunal is "to interpret…and seeking interpretative guidance…from

---

[118] Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 (2) International and Comparative Law Quarterly, 280.

[119] Richard K. Gardiner, *Treaty Interpretation* (Second edn, Oxford University Press 2015) 298.

[120] ibid 299.

[121] Arnold Duncan McNair McNair, *The Law of Treaties* (Clarendon Press 1961) 466.

[122] *Case Concerning Oil Platforms (Separate Opinion of Judge Higgins)* [6 November 2003] (ICJ) Rep 803 para 46.

[123] *United States - Import Prohibition of Certain Shrimp and Shrimp Products* [1998] (DSR) WT/DS58/R.

general principles of international law".[124] In this case, the WTO Appellate Body has also referred to some other relevant international environmental instruments, including the 1992 Rio Declaration on Environment and Development, the CBD and the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals, for interpreting the concerned provisions in the General Agreement on Tariffs and Trade (GATT).[125] The result is that the tribunal established that the sea turtles are indeed part of the "natural resources" and should be protected against the incidental killing during harvesting shrimp according to GATT. Nevertheless, the WTO Appellate Body in the end ruled against US as it found that the US has failed to negotiate the ban with the complaining states and the unilateral proceedings on the shrimp-importation ban is therefore discriminatory.[126]

Another important clarification that needs to be made is with respect to the term "Parties" in the VCLT Article 31(3)(c), as it defines the scope of the applicability of the relevant international rules. The definition of what is a Party to a treaty is not the issue. As provided in the VCLT Article 2(1)(g), a Party is "a State which has consented to be bound by the treaty and for which the treaty is in force".[127] The problem is to apply this concept and Article 31(3)(c) in a multilateral context: whether it refers to just those of Parties to the same treaty who have a dispute, or a group of Parties who have established some particular international agreements among themselves, or whether the reference is to all Parties to the treaty which is being invoked to provide applicable rules. On this issue, McLachlan has articulated four different ways in which the term 'parties' of Article 31(3)(c) can be constructed: A) that all parties to the interpreted treaty should be parties to the treaty relied upon, B)

[124] ibid para 158.

[125] ibid paras 7.52 and 7.53.

[126] ibid 286.

[127] Vienna Convention on the Law of Treaties [adopted 23 May 1969, entered into force 27 January 1980] 1155 UNTS 331, art 2(1)(g).

that reference to another treaty should be permitted if all parties to the dispute are also parties to the other treaty, C) that if a treaty is not in force among all members of the treaty under interpretation, it can only be considered if the rule contained therein is customary international law, and D) that an intermediate test is required, not based on a complete identity of parties, but on an evaluation that the other rules relied upon can reasonably be considered to express the common intentions or at least a common understanding of all the parties.[128]

The above approaches demonstrate different possibilities of applying the principle of systemic integration: from a narrow and strict understanding of Article 31(3)(c) (option A) to a rather flexible and broad taken of this provision (options C and D). In practice, it remains controversial as to which approach may best reflect the exact requirement of Article 31(3)(c). For instance, in the *US-Shrimp* case,[129] the WTO Appellate Body interpreted the concerned provisions in the GATT in light of several environmental treaties, including the UNCLOS, the CBD and the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals, to which some of Parties to the dispute are not Parties.[130] In contrast, the Panel in the *EC-Biotech* case[131] applied the strictest criterion of Article 31(3)(c) and reckoned that since neither of the extraneous treaties the EC (European Communities, now the EU) had referred to was ratified by all Parties to the WTO agreement, the rules derived from the extraneous treaty do not apply in the case concerned.[132] Scholars in general are sceptical about the *EC-Biotech* approach as it does not seem to reflect either the true

---

[128] McLachlan (n 118) 314.

[129] *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (n 123).

[130] ibid paras 7.52 and 7.53.

[131] *European Communities - Approval and Marketing of Biotech Products* [29 September 2006] (DSR) WT/DS291/R; WT/DS292/R; WT/DS292/R.

[132] The EC suggested that the WTO agreements examined in the dispute must be interpreted and applied by reference to relevant rules of international law arising outside the WTO context, specifically, the CBD and its 2000 Cartagena Protocol on Biosafety ibid para 7.68. 7.53 7.54.

meaning of Article 31(3)(c) as text or the current status of customary law.[133] Instead, it is the last approach articulated by McLachlan that has been generally supported by scholars, including Pauwelyn and Young.[134] Overall, the WTO case law has demonstrated that there is no simple or concrete answer to the exact understanding of the term "parties" of the Article 31(3)(c). And indeed, in both cases, the WTO obligations have overridden the principles of international environmental law that were sought under Article 31(3)(c).[135]

Admittedly, Article 31(3)(c) is not often used and when used for performing the tribunals' interpretative function, it faces limitation of integrating specific treaty obligations into the general framework of international law.[136] However, the value of this article and the principle of systemic integration it enshrines needs to be considered against a broader perspective of international law. Taking the *US-Shrimp* case for example, to position trade dispute in the broader context of global environmental protection demonstrates a holistic and evolutionary understanding of trade issues.[137] To this end, the extension and implication of Article 31(3)(c) can connect different areas of international law and facilitate the interplay and cross-fertilisation between

---

[133] Benn McGrady, 'Fragmentation of International Law or "Systematic Integration" of Treaty Regimes: EC-Biotech Products and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2008) 42 (4) Journal of World Trade 590 and Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill Nijhoff 2015) 293-296.

[134] Pauwelyn (n 113) 257 and Margaret A. Young, 'The WTO's Use of Relevant Rules of International Law: an Analysis of the Biotech Case' (2007) 56 (4) International and Comparative Law Quarterly 914.

[135] McLachlan (n 118) 304.

[136] ibid.

[137] Riccardo Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?' (2010) 21 (3) European Journal Of International Law, 663 and Nathalie Bernasconi-Osterwalder, *Interpreting WTO Law and the Relevance of Multilateral Environmental Agreements in EC-Biotech* (Center for International Environmental Law (CIEL), 22-23 May 2007) 3 <https://www.ciel.org/reports/interpreting-wto-law-and-the-relevance-of-multilateral-environmental-agreements-in-ec-biotech-background-note-to-presentation-by-nathalie-bernasconi-osterwalder-may-2007-2/> accessed 22/09/2018.

these areas by bridging gaps between international rules and systems.[138] Thus, in this thesis, I base the arguments on the broadest application of the principle of systemic integration as it presents the most desirable outcome of harmonising different rules of international law. The principles and standards of human rights are considered "relevant rules" in interpreting the ABS provisions in the CBD and the Nagoya Protocol, and *vice versa*, in the sense that each regime contains norms of customary international law.[139] I pay particular attention to the special features and interests of IPLCs as they are often the addressees of ABS obligations as well as human rights in the process of interpretation, as has been stressed several times by the European Court of Human Rights.[140] Furthermore, many Parties to the CBD and the Nagoya Protocol have also made commitments to various human rights instruments. This fact also provides basis for exploring the interrelationship between these two branches of international law.

3.2 The principle of mutual supportiveness

More recently, the discourse of the fragmentation of international law has witnessed the rise of another important debate—about the principle of mutual supportiveness. [141] This principle firstly appeared in the Agenda 21, the key document adopted by the UN Conference on Environment and Development in 1992, which reiterates that the

[138] Merkouris (n 133) 6 and Nele Matz-Lück, 'Norm Interpretation across International Regimes: Competences and Legitimacy' in Margaret A. Young (ed), *Regime Interaction in International Law Facing Fragmentation* (Cambridge University Press 2012) 202. Shelton (n 112) 139 and Pauwelyn (n 113) 5.

[139] Manfred Nowak, *Introduction to the International Human Rights Regime* (Nijhoff 2003) 9.

[140] The ECtHR regularly points out that, when interpreting the ECHR, "the Court must be mindful of the Convention's special Character as a human rights treaty, and it must also take the relevant rules of international law into account", see *Case of Al-Adsani v The United Kingdom* [21 November 2001] (ECHR) 34 EHRR 273 para 55 and Gardiner (n 119) 36.

[141] See, *inter alia*, Abi-Saab (n 113) 919, Koskenniemi and Leino (n 113) 554 and essays in Margaret A. Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012) 21.

economic growth and environmental protection must be "mutually supportive".[142] This remark was then picked up by the WTO Committee on Trade and Environment in the following years, which recurrently highlighted its aim of "making international trade and environmental policies mutually supportive".[143] Later in 1998, mutual supportiveness was established in a normative form in the Preamble of the 1998 Rotterdam Convention on Prior Informed Consent in light of the goal of sustainable development.[144] Same formula has also been adopted in the 2000 Cartagena Protocol on Biosafety[145] and the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture.[146] Furthermore, mutual supportiveness is included in the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions as an operative clause regulating its relationship with other treaties.[147] Similarly, as Article 4 of the Nagoya Protocol establishes the relationship between the Protocol and other international agreements and instruments, it provides in paragraph 3 that "(t)his Protocol shall be implemented in a mutually supportive manner with other international instruments relevant to this Protocol".[148] Thus, as Pavoni has pointed out, the principle of mutual supportiveness indeed has transformed from a catchy political formula to an emerging general principle of international law.[149]

---

[142] Agenda 21: Programme of Action for Sustainable Development [14 June 1992] UN Doc A/CONF.151/26 vol.II, para 2.9.

[143] Trade Negotiations Committee, 'Ministerial Meeting' (12-15 April 1994) MTN.TNC/MIN(94)/4 17 and Franz Xaver Perrez, 'The Mutual Supportiveness of Trade and Environment' (2006) 100 Proceedings of the Annual Meeting (American Society of International Law), 27.

[144] Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade [adopted 10 September 1998, entered into force 24 February 2004] 2244 UNTS 337.

[145] Cartagena Protocol on Biosafety [adopted 29 January 2000, entered into force 11 September 2003] CBD EXCOP 1 Decision EM-I/3, pmbl.

[146] With some slight variations, see International Treaty on Plant Genetic Resources for Food and Agriculture, pmbl.

[147] Convention on the Protection and Promotion of the Diversity of Cultural Expressions [adopted 20 October 2005, entered into force18 March 2007] 2440 UNTS 311, art 20.

[148] Nagoya Protocol, art 4.

[149] See Pavoni (n 137) 650.

Specifically, Pavoni has observed that the legal implications of the principle of mutual supportiveness are characterised by two dimensions, namely, an interpretative dimension and a law-making dimension. The first dimension is akin to the principle of systemic integration, as discussed above, in the sense that they both require international norms to be understood as reinforcing each other with a view to fostering harmonisation and complementarity.[150] In the context of the fragmentation of international law, mutually supportive interpretations and actions have been regarded as an objective of systemic integration.[151] As an interpretative technique, mutual supportiveness is useful for addressing tensions between competing regimes involving the application of potentially conflicting rules, even though the degree to which this principle is exploited in the international judicial and arbitral practices is not always consistent.[152] However, the legal implication of the mutual supportiveness exceeds the mere scope of treaty interpretation. Pavoni has demonstrated that the principle also contains a law-making dimension that requires States to cooperate in good faith in order to facilitate law-making processes, especially when efforts at reconciling competing rules have been exhausted.[153] For instance, the ongoing discussion under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) about the relationship between the TRIPS Agreement and the CBD, in particular on the patentability of GR and the protection of TK in light of the ABS requirements under the CBD, has provided powerful manifestations of what the principle of mutual supportiveness might imply. Specifically, the CBD principles of PIC and fair and

[150] ibid, Nele Matz-Lück, 'Harmonization, Systemic Integration and 'Mutual Supportiveness' as Conflict-Solution Techniques' (2008) 17-2006 Finnish Yearbook of International Law, 39 and Jan McDonald, 'Politics, Process and Principle: Mutual Supportiveness or Irreconcilable Differences in the Trade-Environment Linkage' (2007) 30 (2) University of New South Wales Law Journal, 530.

[151] See Pauwelyn (n 113) and ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682 8.

[152] This reflection is built upon the decisions of the US-Shrimp case and the EC-Biotech as well. See detailed analysis by Pavoni, Pavoni (n 137)661.

[153] ibid 655.

equitable benefit-sharing require WTO members to revise the current patent system with respect to GR and TK, which has led to the discussion of a new Article 29bis into the TRIPs Agreement.[154] In 2011, the WTO Trade Negotiations Committee adopted a draft decision with a view to "enhance the mutual supportiveness between the TRIPS Agreement and the CBD", in which a mandatory requirement for the disclosure of origin of GR and TK is articulated in an amendment of the current Article 29 of the TRIPS Agreement.[155] Essentially, this amendment would alter the obligations of the WTO members via a mutually supportive law-making process. This law-making dimension has also been discussed more recently by Morgera in the context of climate change and biodiversity and increasingly in the context of ABS.[156]

With respect to the Nagoya Protocol, as its Article 4 explicitly requires that a mutually supportive implementation vis-à-vis other relevant international instruments, it is quite clear that the principle of mutual supportiveness is recognised in the Nagoya Protocol with both dimensions of its legal implications. Rather unusually, Article 4 also calls for due regard to "useful and relevant ongoing work or practices under such international instruments and relevant international organizations".[157] Thus it further demonstrates the possibility of integrating helpful knowledge and practice from other areas of international law into the Nagoya Protocol.[158] Admittedly, Article 4 and its

[154] WTO, 'Doha Work Programme-The Outstanding Implemnetation Issue on the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity' (5 July 2006) WT/GC/W/564 2.

[155] WTO, 'Draft Decision to Enhance Mutual Supportiveness between the TRIPS Agreement and the Convention on Biological Diversity' (19 April 2011) TN/C/W/59 2-3.

[156] Elisa Morgera, 'Far Away, So Close: A Legal Analysis of the Increasing Interactions between the Convention on Biological Diversity and Climate Change Law' (2011) 2 (1) Climate Law, 86 and Michael Halewood and others, 'Implementing Mutually Supportive Access and Benefit Sharing Mechanisms under the Plant Treaty, Convention on Biological Diversity, and Nagoya Protocol' (2013) 9 (1) Law, Environment and Development Journal, 68.

[157] Nagoya Protocol, art 4(3).

[158] Gurdial Singh Nijar, 'An Asian Developing Country's View on the Implementation Challenges of the Nagoya Protocol' in Elisa Morgera, Matthias Buck and Elsa Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-Sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013) 263 and Morgera, Tsioumani and Buck (n 26) 88.

integration of the principle of mutual supportiveness is not free from interpretative ambiguity. Important questions remain, for instance, the benchmark for assessing the usefulness of ongoing work and practices and the scope of relevant rules that could be taken into consideration.[159] Nevertheless, international human rights law, as important relevant norms and practices, shall be taken full consideration in the process of negotiating future specialised ABS instruments or other relevant agreements. Thus, it can be concluded that a research of the complementarity between the Nagoya Protocol and human rights is not only as an interpretative requirement imposed by Article 31(3)(c), but also strongly underscored by the principle of mutual supportiveness with a view of achieving a synergistic understanding and implementation of international law.

4. Research questions and thesis structure

The discussion of the emergence of the international ABS framework illustrates the multifaceted challenges facing biodiversity conservation and fair and equitable benefit-sharing, which are interrelated with issues of protecting IPLCs' rights pertaining to lands, natural resources and culture. Contemporary developments in international law, especially human rights law, provide prominent avenues to address concerns and interests of IPLCs. Relying on the principle of systemic integration and mutual supportiveness, I aim to explore the potential of a mutually supportive interpretation of the Nagoya Protocol in light of international human rights law with respect to IPLCs. I ask the following questions to guide the research:

1. What are, and what are the purpose of, the principles of systemic integration and mutual supportiveness?

[159] Morgera, Tsioumani and Buck (n 26) 88 and CBD Subsidiary Body on Implementation, 'Study into Critera to Identify a Specialized International Access and Benefit-Sharing Instrument, and a Possible Process for its Recognition' (29 May 2018) UN Doc CBD/SBI/2/INF/17 para 20.

2. What are the strengths and limitations of the Nagoya Protocol in protecting IPLCs' rights?
3. What are the relevant human rights of IPLCs in the ABS context and what are their implication on States' obligations vis-à-vis IPLCs?
4. Can Nagoya Protocol and human rights be mutually supportive in protecting the rights of IPLCs?
5. What are the normative and practical implications of the principles of systemic integration and mutual supportiveness?
6. What are the limitations of applying the principles of systemic integration and mutual supportiveness in bridging the gaps between the Nagoya Protocol and the international human rights law?

I shall make clear that this research concerns all of the "constitutive processes" of making international ABS norms and human rights law, including the procedures, participants and instruments employed in the process,[160] rather than theories of international law.[161] Accordingly, I focus on treaties and non-binding legal instruments adopted under the UN bodies and other international organisations, customary international law and general principles, as well as jurisprudential interpretation by international courts and tribunals. It shall be noted that the systems and mechanisms of international law vis-à-vis IPLCs have been historically established by mostly European jurists from a Western-centric perspective in the age

[160] Antonio Cassese and Joseph Weiler (eds), *Change and Stability in International Law-Making* (Walter de Gruyter 1988) 8 and Alan E. Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 1.

[161] For instance, the traditional discussion of the sources of international law or the New Haven policy science approach to international law. See in general, James Crawford and Ian Brownlie, *Brownlie's Principles of Public International Law* (Eighth edn, Oxford University Press 2012) 20 and W. Michael Reisman, 'The View from the New Haven School of International Law' (1992) 86 Proceedings of the Annual Meeting (American Society of International Law), 118.

of colonialism and European State formation,[162] which continue to influence how IPLCs are addressed by international law and how they participate in international law-making nowadays. Nevertheless, I chose this context for ensuring the clarity and consistency of the discussion. I do so without the intention to undermine other approaches to international law, for instance, Third World and the feminist approaches to international law.[163]

The main body of the thesis consists of three chapters under the theme of access, benefit-sharing and compliance respectively, as they are the three pillars of the international ABS framework.[164] Each of these chapters outlines the relevant provisions and debates of the Nagoya Protocol and offers an analysis of the relevant human rights implications. Specifically, chapter two looks at the interpretation and implementation of the Nagoya Protocol with respect to access to GR and associated TK and discusses their implications vis-à-vis the rights of IPLCs and the responsibilities of State governments. It focuses on the key concepts, principles and procedural requirements adopted under the Nagoya Protocol, including GR, TK, State sovereignty and PIC. Emphasising on situations where IPLCs' GR and TK are sought and accessed, I unpack IPLCs' human rights of self-determination, FPIC and those pertaining to their customary laws and survey the implications of these rights on States' obligations vis-à-vis IPLCs in the ABS context. Chapter three investigates benefit-sharing, the so called "grand bargain" struck under the CBD between developing countries with rich biodiversity and developed countries with advanced technology

[162] For a chronology of the Euro-American Law of Nations and Indigenous peoples see, Paul Havemann (ed), *Indigenous Peoples' Rights in Australia, Canada & New Zealand* (Oxford University Press 1999) 13.

[163] See Obiora Chinedu Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective' (2005) 43 (1 2) Osgoode Hall Law Journal, 171, Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93 (2) American journal of international law, 380 and Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000) 1.

[164] In addition to "access" and "compliance" being another two pillars, see Greiber and others (n 30) 12.

and funding.[165] In this chapter, I look at the key elements and issues of benefit-sharing, including, means for its realisation, legitimate ABS beneficiaries, Parties' obligations to implement benefit-sharing and ensure intra-State benefit-sharing with ILCs, and the core normative standards "fair and equitable". Chapter three approaches a mutually supportive understanding of ILCs' ABS rights and human rights as well as correlated States' obligations via the lens of three substantive human rights, namely, the right to equality and non-discrimination, the right to development and to property. Chapter four looks at the issue of compliance. It considers the enforcement of the Protocol in inter-State and intra-State contexts and asks to what extent and through what means the compliance with the Nagoya Protocol could be ensured and facilitated and that non-compliance could be effectively addressed. Based on a scrutiny of the international compliance mechanism and domestic compliance measures of the Nagoya Protocol, I discuss the opportunities and challenges for IPLCs to participate in the compliance processes of ABS rules in an effective and meaningful manner. These questions are then analysed in light of ILCs' human right of access to justice and human rights mechanisms to ensure States' compliance of their inter-State obligations. The final chapter concludes the key findings and their relevance in response to the research questions, summarising how and the extent to which the Nagoya Protocol and human rights law may complement each other in realising their respective objectives.

[165] Michael A Gollin, 'An Intellectual Property Rights Framework for Biodiversity Prospecting' in Walter V. Reid and others (eds), *Biodiversity Prospecting: Using Genetic Resources for Sustainable Development* (World Resources Institute 1993) 191 and Greiber and others (n 30) 83 and Kate and Laird (n 27) 75.

Chapter Two

Access and human rights implications for access related provisions of the Nagoya Protocol

This chapter looks at the interpretation and implementation of the Nagoya Protocol with respect to its provisions on access to genetic resources (GR) and associated traditional knowledge (TK), as one of the three pillars of the international access and benefit-sharing (ABS) framework.[1] According to the CBD and the Nagoya Protocol, access to GR is subject to domestic ABS legislation or regulatory requirements, in particular the prior informed consent (PIC) of the provider Party of GR.[2] This is due to the fact that natural resources are paramount to States' interests—a point that is substantiated through the negotiation of the CBD and called by especially developing countries for national controls over GR.[3] In situations where Indigenous and local communities (ILCs) hold GR and associated TK, the Nagoya Protocol requires Parties to ensure PIC or approval and involvement of ILCs[4] and to respect ILCs' customary laws, community protocols and procedures while implementing their obligations under the Protocol.[5] International legal scholars have appraised these provisions of the Nagoya Protocol in the sense that it is the first binding environmental treaty to address issues of accessing GR and TK held by ILCs who live within sovereign States and impose intra-State obligations to Parties toward ILCs who live within their territories.[6]

---

[1] In addition to "compliance" and "benefit-sharing" being the other two pillars, see Thomas Greiber and others, *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing* (IUCN 2012) 12.

[2] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization [adopted 29 October 2010, entered into force 12 October 2014] CBD Decision 10/1, art 6 (1).

[3] Lyle Glowka, Françoise Burhenne-Guilmin and Hugh Synge, *A Guide to the Convention on Biological Diversity* (IUCN 1994) 5.

[4] Nagoya Protocol, arts 6(1)(2) and 7.

[5] ibid art 12.

[6] See Elisa Morgera, Elsa Tsioumani and Matthias Buck, *Unraveling the Nagoya Protocol: A Commentary on the Nagoya Protocol on Access and Benefit-sharing to the Convention on Biological Diversity* (Brill 2014) 137 and

For instance, Vermeylen suggests that the Protocol provides protection to ILCs' TK and GR in accordance with ILCs' own worldviews and customary rules.[7] Morgera and others argue that the Nagoya Protocol presupposes a rights-based system by mandating State Parties to address the concerns of ILCs and protect their rights over their GR and TK.[8] Furthermore, Savaresi points out the particular relevance of international human rights in interpreting the ABS provisions via the overlapping norms such as free prior informed consent (FPIC) as adopted under human rights law vis-à-vis PIC.[9] Meanwhile, many practical and interpretative uncertainties and challenges persist. For instance, Greiber and others have warned that the commitment of the Nagoya Protocol to respect ILCs' customary rules and community protocols might be rather "tangential"[10] and Tobin also has suggested that the legal status of ILCs' customary laws in domestic contexts remain extremely unclear and under-explored in scholarly debates.[11]

Against this background, this chapter investigates the access-related provisions in the Nagoya Protocol and their implications vis-à-vis the rights of ILCs and the responsibilities of State governments. Based on a range of binding and non-binding instruments and relevant scholarly discussion, I focus on the key concepts, principles and procedural requirements adopted under the ABS framework, including GR, TK, State sovereignty and PIC. In light of the principle of mutual supportiveness, this

---

Annalisa Savaresi, 'The International Human Rights Law Implications of the Nagoya Protocol' in Elisa Morgera, Matthias Buck and Elsa Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-Sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013) 53.

[7] Saskia Vermeylen, 'The Nagoya Protocol and Customary Law: the Paradox of Narratives in the Law' (2013) 9 (2) Law, Environment and Development Journal, 187.

[8] Morgera, Tsioumani and Buck (n 6) 374.

[9] Savaresi (n 6) 53.

[10] Greiber and others (n 1) 138.

[11] Brendan Tobin, 'Setting Protection of TK to Rights: Placing Human Rights and Customary Law at the Heart of TK Governance' in Evanson C. Kamar and Gerd Winter (eds), *Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit Sharing* (Routledge 2009) 111.

chapter also articulates the potential interaction between the Nagoya Protocol and relevant human rights. I ask questions, including, what are the relevant human rights established at the international level for ILCs in situations where their GR and TK are sought and accessed? What is the relationship between the ABS rights and the human rights of ILCs and to what extent could they assist one another in their realisation? What are the relevant obligations imposed upon States by international human rights standards? The human rights of self-determination, FPIC, culture and those pertaining to ILCs' customary laws are highlighted as bridging norms between the Nagoya Protocol and the human rights law because of their fundamental importance and particular relevance to these questions. For instance, the realisation of the right of self-determination, as provided in the most fundamental human rights,[12] requires economic and cultural empowerment of ILCs in matters relating to their land and natural resources, which would not be possible without having ILCs effectively participate in the decision-making processes on projects that might affect their rights.[13]

The chapter consists of four sections. The first and second sections unpack the key subject matters, principles and procedural requirements of ABS and discuss the implications for ILCs' rights and States' responsibility. The third section explores the connection between the access-related provisions in the Nagoya Protocol and international human rights law with a sharpened focus on ILCs, under the themes of the right of self-determination, FPIC and customary law respectively. The analysis is conducted in a mind-set that the ongoing legal developments under the Nagoya Protocol, including its scholarly interpretation and national implementation, as well as

[12] For instance, the Charter of the United Nations and two international Covenants, detailed discussion see section 3.1.

[13] See Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002) 406, Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (Second edn, Brill Nijhoff 2016) 85, S. James Anaya, *Indigenous Peoples in International Law* (Second edn, Oxford University Press 2004) 97 and Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-determination, Culture and Land* (Cambridge University Press 2007) 129.

relevant development in international human rights law, advancements in technology and their consequential influence on the behaviours of States, ILCs and private entities, all have a part in affecting and shaping the ABS framework and its interpretation. The final section concludes on the normative gaps as well as complementarities between these two branches of international law in the context of access to GR and TK.

1. Key concepts: genetic resources and associated traditional knowledge

Access-related provisions under the Nagoya Protocol refer to GR and associated TK.[14] According to Article 3 of the Protocol, the Protocol shall apply to "genetic resources within the scope of Article 15 of the Convention", as well as "traditional knowledge associated with genetic resources within the scope of the Convention".[15] Thus, instead of defining its subject matter, the Nagoya Protocol referrs to GR and associated TK as established under the CBD. In order to clarify the respective meaning and scope of GR and associated TK, it is therefore necessary to consult relevant provisions of the CBD. This section aims to establish an understanding of the key concepts—GR and TK—for the subsequent analysis. Respective definitions and scope of GR and TK as provided in the CBD and the Nagoya Protocol are firstly investigated. I then look at the broader context of international law in which issues of GR and TK arise. The purpose is to clarify the conceptual elements of GR and TK in access-related provisions, and meanwhile to provide a bird's-eye view of its positions and general interaction with other areas of international law.

[14] Nagoya Protocol, arts 6 7 and 8.

[15] ibid art 3.

1.1 Genetic resources

Under the CBD, "genetic resource" is explicitly defined as "genetic material of actual or potential value", while "genetic material" means "any material of plant, animal, microbial or other origin containing functional units of heredity".[16] GR is also regarded as a subcategory of "biological resources", in addition to "populations, or any other biotic component of ecosystems with actual or potential use or value for humanity".[17] Thus, not all biological material is a genetic resource because GR must contain functional units of heredity, that is, genes that can pass on properties to the next generation.[18] Meanwhile, fruits and vegetables traded and consumed as food are also not GR as covered in the Nagoya Protocol even though they contain functional units of heredity. This is because the ABS rules only apply to the "utilization of genetic resources", which as a term of art means to conduct research and development on the genetic and/or biochemical composition of GR; and food commodities are not used for their genetic or biochemical properties.[19] Arguably, the Nagoya Protocol goes beyond the CBD to also include "derivatives" of GR that do not contain functional units of heredity, but is a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources.[20] As such, the CBD and the Nagoya Protocol provide some legal certainty for interpretation and

[16] Convention on Biological Diversity [adopted 5 June 1992, entered into force 29 December 1993] 1760 UNTS 79, art 2.

[17] ibid art2.

[18] Lyle Glowka, *A Guide to Designing Legal Frameworks to Determine Access to Genetic Resources* (IUCN 1998) 31.

[19] Veit Koester, *The Nagoya Protocol on ABS: Ratification by the EU and its Member States and Implementation Challenges* (Institute for Sustainable Development and International Relations, 2012) 4 <https://www.iddri.org/en/node/21500> accessed 12/07/2019.

[20] Nagoya Protocol art 2(e).

implementation but the definitions relating to GR and their application still lacks clarity and precision.[21]

The general rule of treaty interpretation[22] requires that the term GR to be considered in the overarching context of the CBD as well as the particular objective, "fair and equitable benefit-sharing", to which GR is mostly adopted for.[23] This approach determines that GR shall be understood primarily and specifically for ABS related interpretation and implementation.[24] In this light, we can note two opposing stances held by developing and developed countries in their submissions to the Ad Hoc Open-ended Working Group on Access and Benefit-sharing (WGABS) for elaborating the meaning of GR.[25] While developing countries have advocated for a wider application of GR,[26] they in fact aimed to establish a wider scope of ABS obligations regarding GR because most of the developing countries are the providers of GR.[27] Developed countries such as EU Member States, on the other hand, have promoted to narrow the scope of GR so that their utilisation of GR could be regulated by a comparably narrow set of ABS obligations.[28] A compromise approach manifests in the Nagoya Protocol as adopted in 2010. Without directly altering the meaning of GR as

[21] Morten W. Tvedt and Tomme R. Young, *Beyond Access: Exploring Implementation of the Fair and Equitable Sharing Commitment in the CBD* (IUCN 2007) 53.

[22] Vienna Convention on the Law of Treaties [adopted 23 May 1969, entered into force 27 January 1980] 1155 UNTS 331, art 31.

[23] Tvedt and Young (n 21) 56. CBD, arts 15 16 and 19(2).

[24] CBD Working Group on ABS, 'Study on the Functionality of an ABS Protocol' (26 August 2010) UN Doc UNEP/CBD/WG-ABS/9/INF/20 15.

[25] CBD COP Decision VI/24, 'Access and Benefit-sharing as related to Genetic Resources' (2002) UN Doc UNEP/CBD/COP/DEC/VI/24 1.

[26] For instance, to also include derivatives generated from GR, see CBD Working Group on ABS, 'Report of the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing on the Work of its Third Meeting' (3 March 2005) UN Doc UNEP/CBD/WG-ABS/3/7 22.

[27] Joji Cariño and others, *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization: Background and Analysis* (The Berne Declaration, Bread for the World, Ecoropa, Tebtebba and Third World Network 2013) 33.

[28] ibid 34.

established under the CBD, it includes derivatives of GR that do not contain functional units of heredity into the ABS framework by covering "biotechnology" that works with not only GR but also its derivatives.[29] However, it shall be noted that the exact scope and definition of GR is up to States' national elaboration of ABS rules, which tends to vary dramatically in different national and local contexts.[30]

1.2 Traditional knowledge

The international legal discourse concerning "traditional knowledge" has left the term undefined and fluid, with several related terms that sometimes are used interchangeably, such as Indigenous knowledge or traditional environmental knowledge.[31] TK is generally accepted as being a dynamic concept that refers to a body of knowledge fundamentally different from the Western scientific counterparts.[32] It is intertwined with the customary worldviews, values and traditional practices of ILCs that is vital for their survival,[33] general well-being,[34] and their traditional way of life, which usually includes sustainably managing and exploiting local resources and

[29] Nagoya Protocol, art 2 (e).

[30] Jorge Cabrera Medaglia, Frederic Perron-Welch and Freedom-Kai Phillips, *Overview of National and Regional Measures on Access to Genetic Resources and Benefit-Sharing: Challenges and Opportunities in Implementing the Nagoya Protocol* (Third edn, CISDL 2014) 15.

[31] Graham Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge* (Earthscan 2004) 91 and Martha Johnson, 'Research on Traditional Environmental Knowledge: Its Development and its Role' in Martha Johnson (ed), *Lore: Capturing Traditional Environmental Knowledge* (IDRC/CRDI 2014) 7.

[32] See CBD Working Group on ABS, 'Report of the Meeting of the Group of Technical And Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing' (15 July 2009) UN Doc UNEP/CBD/WG-ABS/8/2* para 33 and Graham Dutfield, 'TK Unlimited: The Emerging but Incoherent International Law of Traditional Knowledge Protection' (2017) 20 (5-6) Journal of World Intellectual Property, 145.

[33] UNCTAD Secretariat, 'Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices' (22 August 2000) UN Doc TD/B/COM.1/EM.13/2 para 11.

[34] According to the WHO, up to 80% of the world's population depends on traditional medicine for its primary health needs, see WHO Secretariat, 'Traditional Medicine' (13 December 2013) EB134/24 para 5.

the ecosystem.[35] In the context of the CBD, TK relates closely to biodiversity conservation. Article 8(j) of the CBD sketches a preliminary scope of TK, referring to the "knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity".[36] Three dimensions to approach this definition have been suggested by the CBD Working Group on Article 8(j) via its cultural, temporal and spatial implications.[37] These dimensions imply that TK as a means to reflect the culture of a community is usually passed on through generations, and its content is usually related to the territory, lands and waters, as well as natural resources that are traditionally occupied or used by the community. With a sharpened focus on ABS, TK has been recognised to be of significant value in discovering and capturing the potential of genetic material—in many cases, TK has raised the scientific awareness to valuable GR and provided preliminary guidance on its potential usefulness.[38] Accordingly, the Nagoya Protocol narrows down the scope of TK by referring to "TK associated with GR";[39] therefore, excludes TK that is not related to GR, but might be to other subjects of ILCs' traditional lifestyle, such as literature, folklores and architecture.[40] As a result, TK that is subject to the ABS rules of the Nagoya Protocol is a particular body of knowledge held by ILCs that embodies their traditional lifestyles relevant for the conservation and sustainable use of biodiversity as well as associated

[35] Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge* (n 31) 97.

[36] CBD, art 8(j).

[37] CBD Working Group on Article 8(j), 'Elements of Sui Generis Systems for the Protection of Traditional Knowledge, Innovations and Practices' (9 September 2009) UN Doc UNEP/CBD/WG8J/6/5 para 31.

[38] See CBD Working Group on ABS, 'The Concept of "Genetic Resources" in the Convention on Biological Diversity and How It Relates to A Functional International Regime on Access and Benefit-Sharing' (19 March 2010) UN Doc UNEP/CBD/WG-ABS/9/INF/1 and CBD Secretariat, 'Report of the Sixth Meeting of the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and related Provisions of the Convention on Biologogical Diversity' (21 November 2009) UN Doc UNEP/CBD/COP/10/2 36.

[39] Nagoya Protocol, art 3.

[40] Elisa Morgera, Matthias Buck and Elsa Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013) 507.

with GR. In reality, Chennells has demonstrated that it is rather difficult to provide a case where TK is "sufficiently" associated with GR and that this task of identifying TK subject to ABS rules essentially leads to the thorny question of identifying the right-holders (ABS beneficiaries) of TK.[41]

1.3 Genetic resources and traditional knowledge in the context of international law

The international ABS framework as established by the CBD and its Nagoya Protocol is not the only multilateral forum where GR and TK are considered and their legal implications on rights and obligations are debated and negotiated. With respect to TK, the discussion about its scope and protection in the context of intellectual property rights (IPRs) and international trade takes place simultaneously under the Word Trade Organization (WTO),[42] the World Intellectual Property Organization (WIPO)[43] and the United Nations Conference on Trade and Development (UNCTAD).[44] Growing concerns about the conservation and sustainable use of marine biological diversity are also evident. Discussions under the auspices of the United Nations General Assembly indicate a trend on developing an international, legally-binding instrument under the

[41] Roger Chennells, 'Traditional Knowledge and Benefit Sharing after the Nagoya Protocol: Three Cases from South Africa' (2013) 9 (2) Law, Environment and Development Journal, 181 and CBD Working Group on ABS, 'Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices' (6 October 2009) UN Doc UNEP/CBD/WG-ABS/8/INF/4 2.

[42] The 2001 WTO Doha Declaration laid the foundation to include discussion about the protection of traditional knowledge and folklore in the Agreement on Trade-Related Aspects of Intellectual Property Rights [adopted 15 April 1994, entered into force 1 January 1995] WTO see Daniel J. Gervais, 'Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach' (2005) Michigan State Law Review, 138.

[43] Especially the work of Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), see Daniel F. Robinson, Ahmed Abdel-Latif and Pedro Roffe (eds), *Protecting Traditional Knowledge: the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge 2017) 3.

[44] UNCTAD, *The Convention on Biological Diversity and the Nagoya Protocol: Intellectual Property Implications--A Handbook on the Interface between Global Access and Benefit Sharing Rules and Intellectual Property* (UNCTAD 2014) 30.

United Nations Convention on the Law of the Sea (UNCLOS) to address especially marine biodiversity beyond areas of national jurisdiction that also includes GR.[45] Furthermore, the contemporary development of international human rights standards also demonstrates increasing relevance with respect to ILCs as it recognises not only the general human rights of ILCs in an environmental context,[46] but also specific rights related to GR and TK in the context of their utilisation, benefit-sharing and so on.[47]

Thus, a web of complex legal relations and interactions underpinned by different legal approaches and perspectives can be observed for regulating and protecting GR and TK at the international level. What cannot be ignored is also rapidly developing biotechnological inventions, which are able to alter the known methods of utilising GR and TK to an extent that might fundamentally change the way that GR and TK are written.[48] In this light, it is essential to approach the subjects, especially GR, in a flexible and dynamic manner.[49] Thus, I acknowledge that ongoing legal developments under international law on various sujects, including human rights, trade and intellectual property, advancements in technology and their consequential influence on the behaviours of States and private entities, as well as the international scholarly debates all have a part in affecting and shaping the Nagoya Protocol and its interpretation of what GR and TK are relevant for its purposes. As a matter of scope,

---

[45] UNGA Res 72/249, 'International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction' (19 January 2018) UN Doc A/RES/72/249 para 2.

[46] See Human Rights Council, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (24 January 2018) UN Doc A/HRC/37/59 and Alan E. Boyle, 'Human Rights and the Environment: Where Next?' in Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press 2015) 203.

[47] Elisa Morgera, 'Fair and Equitable Benefit-Sharing at the Cross-Roads of the Human Right to Science and International Biodiversity Law' (2015) 4 (4) Laws, 804.

[48] Pottage Alain and Marris Claire, 'The Cut that Makes a Part' (2012) 7 (2) BioSocieties, 104.

[49] ABS, *The Concept of "Genetic Resources" in the Convention on Biological Diversity and How It Relates to A Functional International Regime on Access and Benefit-Sharing* (n 38) 2.

this research discusses GR and TK as defined under the CBD and its Nagoya Protocol and addresses their legal implication for ABS purposes, taking into account international human rights law at the interface with the Nagoya Protocol, especially with respect to ILCs and their rights towards GR and TK.

2. Principles and procedural requirements for access

The access-related provisions are grounded on a certain set of principles and procedural requirements in the Nagoya Protocol. This section firstly investigates the underpinning principle of State sovereignty and examines its implications for the intra-State relationship between States and its ILCs. It then unpacks the key procedural requirement for access to GR and TK—prior informed consent (PIC)— based on a range of relevant binding and non-binding instruments adopted under the CBD. The aim, function and standards of PIC mechanism are visited in turn and the importance of PIC in safeguarding the participatory rights of ILCs is highlighted. Furthermore, according to Article 12 of the Nagoya Protocol on TK associated with GR, I examine the role of ILCs' customary rules and community protocols in the process of States' implementation of the Nagoya Protocol.[50] In light of the discourse on legal pluralism, I suggest that Article 12 poses an opportunity of considering the legitimacy and the function of ILCs' customary laws as opposed to domestic laws. Finally, the section examines the content and characteristics of the obligations imposed upon State governments in the process of implementing their obligations under the Nagoya Protocol.

[50] Nagoya Protocol art 12(1).

2.1 The principle of State sovereignty and its relationship with the rights of ILCs

State sovereignty over natural resources is the cornerstone of the architecture and functionality of the international ABS framework.[51] This is, foremost, due to the fact that natural resources are valuable not only for the economy, but also for culture and the environment; therefore, are paramount to States' interests. This point has been substantiated through the negotiation of the CBD and grounded on the calls of especially developing countries for national controls over GR.[52] As a result, Article 15 of the CBD recognises that the authority to determine access to GR rests with the national governments and is subject to national legislation. In general, by proclaiming the sovereign rights of States over their biological resources,[53] recognising the sovereign rights to exploit their own resources[54] and recalling the sovereign rights of States over their natural resources as a basis for national authority to determine access to GR,[55] "sovereignty" indeed functions as a principle underpinning the access-related provisions of the CBD. While affirming States' sovereign rights to their natural resources, the CBD does not grant States a proprietary right over these resources, nor does it clarify whether such sovereign rights extend to GR and TK held by ILCs.[56] As a measure of *in-situ* conservation, the CBD Article 8(j) requires each Party, subject to national legislation, "to respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles".[57] Louka has argued that this provision could be read as a recognition of the right of ILCs

[51] Glowka, Burhenne-Guilmin and Synge (n 3) 3.

[52] ibid 5.

[53] CBD, pmbl.

[54] ibid art 3.

[55] ibid art 15.

[56] Instead, the issue of ownership is left to be determined by the respective national law of the Party States. Glowka, Burhenne-Guilmin and Synge (n 3) 76.

[57] CBD, art 8(j).

to their "knowledge, innovations and practices".[58] More conservatively, Greiber and some others suggest it does not establish a right *per se* but at least could be reckoned as a recognition of the fact that TK associated with GR most often vests with ILCs.[59] Nevertheless, there is no explicitly line between the sovereign rights of State and the rights of ILCs with respect to GR and TK held by ILCs.

The Nagoya Protocol inherits the principle of State sovereignty, as it renders the obligation of Parties to regulate access to GR to the "exercise of sovereign rights over natural resources" and their respective domestic laws. In particular, Article 7 and the first two paragraphs of its Article 6 read:

> Article 6: 1. In the exercise of sovereign rights over natural resources, and subject to domestic access and benefit-sharing legislation or regulatory requirements, access to genetic resources for their utilization shall be subject to the prior informed consent of the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention, unless otherwise determined by that Party.
>
> 2. In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of Indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources.
>
> Article 7: In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by Indigenous and local communities is accessed with the prior and informed consent or approval and involvement of

[58] Elli Louka, *International Environmental Law: Fairness, Effectiveness and World Order* (Cambridge University Press 2006) 301.

[59] Greiber and others (n 1) 109.

> these Indigenous and local communities, and that mutually agreed terms have been established.

Thus, the Nagoya Protocol addresses the issue of access to GR held by ILCs; therefore, articulates Parties' obligation in regulating access to GR and TK in an intra-State context with the binding force of a treaty.[60] In Article 7 and paragraph 2 of Article 6 that address GR and associated TK held by ILCs, the language of sovereign rights is absent, albeit Parties' obligations to ensure ILCs' PIC or approval and involvement are still qualified by "in accordance with domestic law".[61] Specifically, for GR held by ILCs, Parties are required to take measures, *as appropriate*, with the aim of ensuring that the PIC or approval and involvement of ILCs is obtained for access to GR where they have *the established right* to grant access to such resources.[62] For associated TK, although the requirement of ILCs to have an "established right" is absent, the obligation is qualified by similar wordings like "as appropriate" and "with the aim of ensuring". Legal uncertainties thus persist not only in a practical sense that it is unclear how each Party would interpret the qualifiers and implement them at the domestic level, but also in a normative sense in that the Nagoya Protocol essentially does not address the crucial relationship between States' sovereign rights and the rights of ILCs. In fact, these provisions are commonly interpreted as to suggest that, formally adopted national laws that explicitly address the protection of GR and TK of ILCs may be necessary, in order for the relevant rights of ILCs to be recognised and protected under the Nagoya Protocol.[63] This interpretation, nevertheless, could undermine the

[60] As the first international environmental treaty to do so, see Morgera, Tsioumani and Buck (n 6) 137.

[61] Nagoya Protocol, arts 6(2) and 7.

[62] ibid art 6(2). Emphasis added.

[63] Tomme R. Young, 'An International Cooperation Perspective on the Implementation of the Nagoya Protocol' in Elisa Morgera, Matthias Buck and Elsa Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013) 461.

interests and rights of ILCs as it suggests that ILCs' rights are subsidiary to domestic law.[64] I will articulate this point in the following section 3.

Even though established as a cornerstone of the international ABS framework, State sovereignty is neither unconditional nor absolute.[65] The danger embedded in the trump card that is often played by States—"State A is sovereign therefore its conduct is unquestionable"—merits caution of international lawyers and scholars.[66] First, in light of the fundamental principle of the CBD that "the conservation of biological diversity is a common concern of humankind", States' sovereign rights over natural resources shall be understood and exercised in harmony with the common duty of States to conserve biological diversity and that the exercise of such rights is not to prevent biodiversity conservation from being treated as a question of common concern for all States.[67]According to the Nagoya Protocol, excising States' sovereign rights is further conditioned by certain procedural requirements of implementation, such as to facilitate access, implement PIC and establish MAT.[68] Additionally, it is necessary to understand State sovereignty as an evolutionary concept.[69] Judicial interpretations of States' sovereignty in, for instance, *S.S. "Wimbledon"* case and *Aegean Sea Continental Shelf* case, indicate that the implications of this principle, if seen as a legal creation for addressing States' international rights and duties, needs to be considered

---

[64] UNGA, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples' (13 August 2012) UN Doc A/67/301 para 60.

[65] Glowka, Burhenne-Guilmin and Synge (n 3) 3.

[66] This is especially the case with States' "internal affairs", see John Jackson, 'Sovereignty-modern: a New Approach to an Outdated Concept' (2003) 97 (4) American journal of international law, 782.

[67] Note that the CBD is not the only treaty that highlights this point, for example, African Convention on the Conservation of Nature [adopted 15 September 1968, entered into force 16 June 1969] 1001 UNTS 4 and Convention Concerning the Protection of the World's Cultural and Natural Heritage [adopted 16 November 1972, entered into force 17 December 1975] 1037 UNTS 151. See Patricia W. Birnie, Alan E. Boyle and Catherine Redgwell, *International Law and the Environment* (Third edn, Oxford University Press 2009) 138.

[68] CBD, art 15.

[69] James Crawford, *The Creation of States in International Law* (Second edn, Oxford University Press 2007) 32.

according to specific circumstances.[70] Scholars including Henkin, Weil and Crawford agree with this approach and further add that the understanding of States' sovereignty needs to reflect the ongoing development in the broader context of international law.[71] This perspective is especially important in clarifying the relationship between States and ILCs. In human rights law, for instance, the normative power of sovereignty has been significantly questioned, challenged[72] and arguably, weakened since the Second World War.[73] States' sovereign rights also include and are increasingly intertwined with States' obligations to respect and fulfil ILCs' human rights. In this light, I acknowledge that this research considers States sovereignty as a fundamental yet conditioned principle to achieve the objectives of the CBD and the Nagoya Protocol.

2.2 Procedural requirements: a focus on prior informed consent

As demonstrated, the Nagoya Protocol articulates the role of ILCs in the process of granting access of their GR and associated TK.[74] Procedural requirements include: A) PIC or "approval and involvement" of ILCs for accessing their GR and TK, and B) MAT on granted access.[75] This section focuses on the requirement of PIC or "approval

[70] For instance, the ruling of the former Permanent Court of International Justice in *S.S. "Wimbledon" (United Kingdom, France, Italy & Japan v Germany)* [17 August 1923] (PCIJ) Series A No. 1. Also the *Aegean Sea Continental Shelf Case (Greece v Turkey)* [19 September 1978] (ICJ) Rep 62 and *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [13 July 2009] (ICJ) ICGJ 421.

[71] See Louis Henkin, 'That "S" Word: Sovereignty, and Globalization, and Human Rights, et cetera' (1999) 68 (1) Fordham Law Review, 2, Prosper Weill, 'Towards Relative Normativity in International Law?' (1983) 77 (3) American journal of international law, 418 and James Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Brill 2014) 92.

[72] Anne-Marie Slaughter, 'Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform' (2005) 99 (3) American journal of international law, 620.

[73] Benedict Kingsbury, 'Sovereignty and Inequality' (1998) 9 (4) European Journal Of International Law, 602.

[74] Nagoya Protocol, arts 6(2) and 7. Lyle Glowka and Valérie Normand, 'The Nagoya Protocol on Access and Benefit-Sharing: Innovations in International Environmental Law' in Elisa Morgera, Matthias Buck and Elsa Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013) 30.

[75] Nagoya Protocol, art 6(2).

and involvement", while MAT as a means to realise fair and equitable benefit-sharing is studied in-depth in chapter three. How have PIC or its equivalences been defined and interpreted under the Nagoya Protocol, especially those to be obtained from ILCs? To what extent could these procedural requirements safeguard ILCs' control over their GR and TK and support ILC's ABS-related claims? In order to answer these questions, I examine relevant binding and non-binding instruments adopted under the CBD framework chronologically as they address PIC from different perspectives and in various depths. It concludes with three key observations. First, PIC, as a key procedural legal requirement of ABS, has been significantly elaborated in international environmental law. It is not a fixed process that can provide a one-size-fits-all solution but plays an important role in ensuring ILCs' participation in ABS transactions.[76] Second, there exists concerning interpretative ambiguity of PIC-related provisions in the Nagoya Protocol. The narrow reading of the text might impair ILCs' claims to their GR and TK, thus creating hurdles for ILCs to be recognised as legitimate beneficiaries. Third, during the process of elaborating the legal obligation relating to PIC, the CBD Parties have enunciated the connection between the ABS framework and the protection of ILCs' rights to culture, TK and lands via a range of innovative voluntary guidelines. However, these instruments do not create binding obligations and the rules and standards of best practice might be resisted by many States.

[76] CBD COP Decision XIII/18, 'Mo'otz Kuxtal Voluntary Guidelines for the Development of Mechanisms, Legislation or other Appropriate Initiatives to Ensure the "Prior and Informed Consent", "Free, Prior and Informed Consent" or "Approval and Involvement", depending on National Circumstances, of Indigenous Peoples and Local Communities for Accessing their Knowledge, Innovations and Practices, for Fair and Equitable Sharing of Benefits arising from the Use of their Knowledge, Innovations and Practices relevant for the Conservation and Sustainable use of Biological Diversity, and for Reporting and Preventing Unlawful Appropriation of Traditional Knowledge' (17 December 2016) UN Doc CBD/COP/DEC/XIII/18 para 9.

2.2.1 Origin of PIC and its adaptation under the international ABS framework

As a procedural legal tool, PIC originates from the medical law regime to address the potential risks of medical treatments received by patients and to support their full autonomy.[77] Consent is also required in the context of medical and scientific experimentation to protect individual from torture or cruel, inhuman or degrading treatment under the International Covenant on Civil and Political Rights (ICCPR).[78] In the early 1980s, the Food and Agriculture Organisation of the United Nations (FAO) promotes PIC as an international legal principle in the context of the International Code of Conduct on the Distribution and Use of Pesticides.[79] The 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade then pins the concept in a legally binding instrument.[80] In this international context, PIC is often utilised as a procedural requirement to protect people, especially in developing countries, from hazardous pesticide formulations that can cause severe health and environmental problems. Meanwhile, it serves as a safeguard to States' sovereign rights and plays an important role in international relations.[81] Admittedly, PIC in the ABS context has distinctive meaning and function. For instance, Dutfield has suggested that the emergence of the

[77] Ruth R. Faden and Tom L. Beauchamp, *A History and Theory of Informed Consent* (Oxford University Press 1986) 3 and 132.

[78] International Covenant on Civil and Political Rights [adopted 16 December 1966, entered into force 3 January 1976] 999 UNTS 171, art 7.

[79] IPM, *Prior Informed Consent A Briefing for the IPM in Developing Countries Project* (IPM, 1998)http://www.pan-uk.org/archive/Internat/IPMinDC/pmn5.pdf> accessed 01/09/2016.

[80] Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade [adopted 10 September 1998, entered into force 24 February 2004] 2244 UNTS 337.

[81] Kuei-Jung Ni, 'Legal Aspects of Prior Informed Consent on Access to Genetic Resources: An Analysis of Global Lawmaking and Local Implementation Toward an Optimal Normative Construction' (2009) 42 (1) Vanderbilt Journal of Transnational Law, 235.

PIC concept is tightly linked to the emergence of the concept of "biopiracy".[82] Indeed, the aim is to protect primarily the sovereign rights and interests of the provider States of GR, as well as the rights and interests of ILCs where they have a legitimate claim to GR and TK, instead of preventing hazards or potential risks.[83]

The reading of Article 6 of the Nagoya Protocol suggests that although PIC is obligatory for access to GR, it is subject to domestic ABS laws and can be "otherwise determined".[84] In other words, under the Nagoya Protocol, PIC as a precondition for accessing to States' GR can be abolished or modified as the provider State deems appropriate.[85] PIC of ILCs cannot be "otherwise determined" but is subject to a range of qualifiers including "established rights" "as appropriate" and "in accordance with domestic law". Nijar points out that these qualifiers could be read rather restrictively to suggest that unless ILCs' right to grant access to GR is explicitly established, Parties do not have to ensure their PIC is obtained.[86] During the meetings of the Interregional Negotiating Group on ABS, many countries have raised concern that the restrictive approach contradicts the very objective of the CBD and the Nagoya Protocol, as well as the intention of Parties as it was expressed during the negotiation history of the Protocol.[87] This interpretative controversy leads to a continuous discussion about PIC under the CBD framework and the result is a number of instruments adopted by CBD Parties that provide voluntary guidance on the implementation of the PIC in particular at the domestic level. These include, the Bonn Guidelines (2002), the Akwé: Kon

[82] Graham Dutfield, 'Prior Informed Consent and Traditional Knowledge in a Multicutural World' in Toshiyuki Kono (ed), *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable* (Intersentia 2009) 266..

[83] Greiber and others (n 1) 95.

[84] The provision includes a qualifier "unless otherwise determined by that Party", see Nagoya Protocol, art 6(1).

[85] See Glowka, Burhenne-Guilmin and Synge (n 3) 81 and Greiber and others (n 1) 96.

[86] See Gurdial Singh Nijar, 'The Nagoya Protocol on Access and Benefit Sharing of Genetic Resources: Analysis and Implementation Options for Developing Countries' (2011), 25 and Morgera, Tsioumani and Buck (n 6) 147.

[87] See CBD Working Group on ABS, 'Report of the Meeting of the Interregional Negotiating Group' (21 September 2010) UN Doc UNEP/CBD/WG-ABS/9/ING/1 art 5(2) and Greiber and others (n 1) 96.

Guidelines (2004), the Tkarihwaié:ri Code of Ethical Conduct (2011) and the Mo'otz Kuxtal Voluntary Guidelines (2016). I examine them and their PIC-related provisions in the following section in order to unpack the meaning of PIC and its legal implications vis-à-vis ILCs in the ABS context.

2.2.2 Normative innovations of CBD Parties via voluntary guidelines

Before I discuss in depth the voluntary guidelines and their implications, it is necessary to clarify why they merit attention. The fact that these instruments are not legally binding among Parties make them "soft law" in nature. However, unanimously adopted by some 180 countries, these soft instruments have "a clear and indisputable authority" and provide "welcome evidence of an international will to tackle difficult issues that require a balance and compromise on all sides for the common good".[88] In scholarly discussion, it is increasingly accepted that these soft instruments can generate a wide-ranging consensus on international definitions and legal standards and indeed, contribute significantly to the corpus of international law.[89] In the context of the CBD, for instance, the Bonn Guidelines as adopted in 2002 has eventually led to the articulation and adoption of the Nagoya Protocol in 2010. Other voluntary instruments adopted after 2010 are also important as they provide essential and detailed rules and standards on implementing the Nagoya Protocol and the ABS provisions in the CBD. They may not yet have acquired binding characteristics or status as a subsequent agreement of Parties. Nevertheless, the normative innovations enshrined in these soft

[88] As suggested by Hamdallah Zedan, the former Executive Secretary of the CBD, see CBD COP Decision VII/16, 'Akwé: Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities' (13 April 2004) UN Doc UNEP/CBD/COP/DEC/VII/16 intro IV.

[89] Ulrich Fastenrath, 'Relative Normativity in International Law' (1993) 4 (3) European Journal Of International Law 314. Alan E. Boyle, 'Soft Law in International Law-making' in Malcolm D. Evans (ed), *International Law* (Oxford University Press 2014) 118.

instruments, as will be discussed, are a significant part of the ABS framework and cannot be dismissed for constructing a holistic and systemic perspective of the Nagoya Protocol. Furthermore, there exists the possibility for the normative standards of these soft instruments to be adopted by law-applying organs, such as judges, officials or legislators, and therefore, become authentic interpretations that are of legally-binding effects. [90]

The Bonn Guidelines. In 2002, as the work to operationalise CBD provisions began to intensify, the Conference of Parties (COP) to the CBD adopted the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (Bonn Guidelines)[91] at its sixth meeting. This voluntary instrument seeks to assist CBD Parties, governments and other stakeholders in developing national access legislation as well as negotiating contractual ABS terms.[92] As far as PIC is concerned, the Bonn Guidelines stipulate the basic principles for a PIC system, including legal certainty and clarity, minimum cost, transparent restrictions, legal grounds and consistency with CBD objectives.[93] Tully has observed that the PIC process articulated in the Bonn Guidelines does not only involve top-down efforts assigned to legislators and regulators, but also bottom-up inputs from communities and private entities—a two-tiered approach underpinned by public participation and consultation processes.[94] A thorough reading of the Bonn Guidelines

[90] Hans Kelsen, 'On the theory of interpretation' (1990) 10 (2) Legal Studies 127Alan E. Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 216.

[91] CBD COP Decision VI/24, 'Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization ' (27 May 2002) UN Doc UNEP/CBD/COP/6/20.

[92] ibid intro.

[93] Stephen Tully, 'The Bonn Guidelines on Access to Genetic Resources and Benefit Sharing' (2003) 12 (1) Review of European Comparative and International Environmental Law, 93.

[94] ibid.

also unveils its fundamental concern that PIC shall be meaningful, inclusive and reflective to the voices of ILCs.

Specifically, the Bonn Guidelines highlight the principal role of competent national authority(ies) to grant access permission and suggest that this system could be established at different levels domestically (national/provincial/local). [95] The instrument provides that ILCs' competence to grant PIC shall also be considered as a basic principle of PIC system, as appropriate to the circumstances and subject to domestic law.[96] In the same line, the Guidelines further address the need to respect the established legal rights of ILCs vis-à-vis their GR and TK, and that PIC or "the approval and involvement of the holders of traditional knowledge, innovations and practices" should be obtained, in accordance with their traditional practices, national access policies and subject to domestic laws.[97]

With respect to what specific elements should PIC contain for practical purposes, the Bonn Guidelines provide a list as such: competent authority(ies); timing and deadlines; specification of use; procedures for obtaining PIC; mechanism for consultation of relevant stakeholders; process.[98] They further specify that PIC needs to be obtained adequately in advance to be *meaningful* for both those seeking and for those granting access.[99] PIC should also be strictly linked to the purpose for which consent is granted to. The Guidelines suggest new PIC should be obtained, when any change of use (including transfer to third parties) is of concern.[100] Furthermore, one chapter of the Bonn Guidelines, "Participation of Stakeholders", highlights the

[95] VI/24 #Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization # (n 91) paras 14 15 28 and 29.

[96] ibid para 26(d).

[97] ibid para 31.

[98] ibid para 27.

[99] ibid para 33. Emphasis added.

[100] ibid para 34.

importance of and the possible ways to realise the *involvement* of relevant stakeholders in order to achieve adequate implementation of ABS measures.[101] Specific guidance on developing and implementing consultative initiatives (e.g. national consultative committees),[102] procedural requirements (e.g. that stakeholders' views shall be taken into consideration in each step of the consultation process)[103] and facilitative responsibilities (e.g. provide scientific and legal advice to ILCs and support ILCs for capacity-building in order to ensure effective participation and active engagement) are provided.[104] The instrument also stresses that the diversity of stakeholders might require "appropriate involvement" to be determined on a case-by-case basis.[105] These procedural standards could empower IPLCs to participate in ABS transactions and encourage participatory institutions that possess rights to control access to GR and TK, but it would very much depend on the national implementation and political willingness to substantiate the Guidelines at domestic and local levels.

The Akwé: Kon Guidelines. In the seventh session of the CBD in 2004, another voluntary instrument focusing on the cultural, environmental and social impact assessment regarding ILCs' lands and waters— Akwé: Kon Guidelines[106]—was adopted by the COP.[107] This instrument arises from the CBD commitment to protect TK by incorporating ILCs' considerations into the new or existing impact assessment procedures.[108] Under the general mandate of the Akwé: Kon Guidelines of regulating impact assessment, they highlight the fact that PIC corresponds to different phases of

[101] ibid para 17.

[102] ibid para 19.

[103] ibid para 18.

[104] ibid para 20.

[105] ibid para 17. Emphasis added.

[106] "Akwé: Kon" is a Mohawk term meaning "everything in creation" and used for the name of the Guidelines with a wish to representing the holistic nature of the instrument.

[107] VII/16 (n 88) anx F.

[108] ibid.

the impact assessment process. Thus, the PIC system should consider "rights, knowledge, innovations and practices of Indigenous and local communities; the use of appropriate language and process; the allocation of sufficient time and the provision of accurate, factual and legally correct information". [109] In the same line of strengthening public participation, the Akwé: Kon Guidelines envisage a twofold function of PIC in the impact assessment process: safeguarding ILCs' ownership and control over TK, and respecting ILCs' customary laws and intellectual property rights.[110] Thus, this instrument not only strongly supports public participation of ILCs who are likely to be affected by the proposed activities,[111] but also connects PIC with the objective of safeguarding ILCs' rights and customary rules with respect to their TK.

The Tkarihwaié:ri Code of Ethical Conduct. At its tenth meeting in 2011, the COP adopted the Code of Ethical Conduct on Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant for the Conservation and Sustainable Use of Biological Diversity (Tkarihwaié:ri Code of Ethical Conduct), focusing on the concept of TK.[112] The Tkarihwaié:ri Code of Ethical Conduct embraces a definition of TK that is in line with CBD Article 8(j), meaning "knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biodiversity".[113] The interdependent relationship among TK, ILCs' cultural heritage and their lands and waters is highlighted throughout the text of this instrument.

[109] ibid para 52..

[110] ibid para 60.

[111] ibid para 52. Malgosia Fitzmaurice, 'The Dilemma of Traditional Knowledge: Indigenous Peoples and Traditional Knowledge' (2008) 10 (3) International Community Law Review, 263.

[112] The word "Tkarihwaié:ri" is a Mohawk term meaning "the proper way". CBD COP Decison X/42, 'The Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities' (29 October 2010) UN Doc UNEP/CBD/COP/DEC/X/42.

[113] ibid anx.

Specifically, the instrument notes that the protection of TK is fundamental for promoting full respect for ILCs' cultural and intellectual heritage and in turn, ILCs' access to their lands and waters and the opportunity to practise TK on those lands and waters, is paramount for the retention of TK.[114] Specially, the Code of Ethical Conduct suggests ten general ethical principles that should underpin any interaction/activity in relation to ILCs, including "PIC and/or approval and involvement".[115] For TK that is associated with conservation and sustainable use of biological diversity, the Tkarihwaié:ri Code of Ethical Conduct requires any activities/interactions that are occurring on or likely to impact on ILCs' lands and waters to be carried out with the PIC and/or approval and involvement of ILCs.[116] Notably, it integrates the human rights concept of FPIC into its PIC principle, by elaborating the element "free" without enunciating it—"such consent or approval should not be coerced, forced or manipulated".[117]

The Mo'otz Kuxtal Voluntary Guidelines. In 2016, the COP adopted the Mo'otz Kuxtal Voluntary Guidelines in its thirteenth meeting, providing guidance to ensure ILCs' consent for accessing their TK and fair and equitable benefit-sharing.[118] Controversially, the Guidelines make parallel reference to "PIC", "FPIC" and "approval and involvement", and use the non-conventional term "Indigenous peoples and local communities" (IPLCs). Morgera suggests that the presentation of a mixture of terminologies results from the fact that no consensus can be achieved by national

[114] ibid intro.

[115] These general ethical principles are respect for existing settlements, intellectual property, non-discrimination, transparency/full disclosure, prior informed consent and/or approval and involvement, inter-cultural respect, safeguarding collective or individual ownership, fair and equitable sharing of benefits, protection and precautionary approach. See ibid sec 2 (A).

[116] ibid.

[117] ibid para 11.

[118] XIII/18 (n 76).

delegations during the negotiation process.[119] Indeed, it implies disagreement on a universally agreed term. However, by incorporating a variety of terms rather than dispensing with the principle all together, it also represents an implicit consensus that measures, however termed, must be in place to ensure Indigenous and local participation in the decision-making process.

Based on the key PIC elements identified by the Bonn Guidelines, the Mo'otz Kuxtal Voluntary Guidelines elaborate them with particular attention to accommodate ILCs' special interests and circumstances. That is, a "tailored" PIC system for ILCs. The instrument notes that, "depending on national circumstances and the diverse internal organization of various Indigenous peoples and local communities"; a PIC system may include competent authorities not only at the national or subnational level, but also for ILCs (at the community level).[120] It elaborates the procedural elements of PIC, emphasising *how* the process could be best designated to involve ILCs in the decision-making and consent-granting process to a full extent.[121] Key suggestions of the Guidelines include that the manner and language used in the process should be the ones that are understood by ILCs, and that the timing, implementation and monitoring processes should be culturally appropriate for ILCs.[122] Furthermore, the Guidelines stress that due consideration for customary laws, community protocols, practices and customary decision-making processes of IPLCs could be taken into account for developing national ABS laws and regulations.[123] Thus, it significantly strengthens the two-tiered structure elaborated by the Bonn Guidelines, in the sense that the ILCs are assigned a more proactive role in the PIC process at the local level. Specifically, the

[119] Elisa Morgera, 'Reflections on 2016 UN Biodiversity Conference (Part II): Assessing the Mo'otz Kuxtal Guidelines on Benefit-sharing from the Use of Traditional Knowledge' (*Benelex*, 2017) 26/08/2017.

[120] XIII/18 (n 76) para 17 (b).

[121] ibid para 17.

[122] ibid para 17 (c).

[123] ibid para 17 (g).

gap between the top-down and the bottom-up approaches is narrowed through introducing "community" as a competent authority to issue PIC.

Thus, it can be concluded that the CBD Parties have taken innovative approaches to articulate the meaning and requirement of PIC, especially in Indigenous and local contexts. As a precondition for access to GR and TK, PIC is designated to safeguard the rights and interests of provider States as well as ILCs/IPLCs where applicable. While the CBD and its Nagoya Protocol subject the ways in which PIC should be implemented to domestic laws, a range of voluntary guidelines is in place, providing detailed, albeit in some cases, controversial, standards for transposing PIC as a legal mechanism into domestic systems. Specifically, the importance of strengthening public participation and empowering democracy in the ABS transactions has been highlighted. The connection between PIC mechanisms and the protection of ILCs' rights to their culture, TK and lands has also been emphasised in light of the recognition of the interdependent relationship among TK, cultural heritage and the lands and resources of ILCs. Moreover, the necessity and standards of respecting and taking into account specific national circumstances, customary laws and cultural diversity have been elaborated in order to achieve an effective, meaningful and inclusive PIC process. Nevertheless, it shall be noted that these instruments are adopted via COP decisions as voluntary instruments. Regardless the potential contribution they may have to the interpretation and implementation of the Nagoya Protocol in a mutually supportive manner with relevant human rights standards, they can only encourage and facilitate such process but not impose obligations on Parties to conduct these best practices. In reality, it still greatly depends on State governments for these international standards of soft law to take full effects.

2.3 ILCs' customary laws and community protocols

The customary laws of ILCs are addressed differently under the CBD and its Nagoya Protocol. The CBD does not refer to the customary laws of ILCs explicitly. Instead, concerns of ILCs are scattered across provisions relating to *in situ* conservation of biodiversity,[124] sustainable use of its components[125] and technical and scientific cooperation.[126] Its Working Group on ABS, nevertheless, has investigated the implications of customary laws for TK protection and ABS based on several case studies including India, China, Peru and Kenya.[127] The Working Group found that, customary laws, including specific rules, social values and principles, worldviews and beliefs, codes of conduct and established practices, may vary in exact content but often share common principles.[128] For instance, they are usually enforced by community institutions, derived from the utilisation of natural resources, locally recognised, orally held, dynamic and underpinned by values like reciprocity and equilibrium.[129] By contrast, Article 12 of the Nagoya Protocol establishes an overarching clause obliging Parties to "take into consideration" ILCs' customary laws, community protocols and procedures with respect to TK associated with GR while implementing all their obligations.[130] Several "broadly framed" obligations for Parties to facilitate understanding and fairness in ABS processes,[131] support the development of

[124] "In-situ conservation" means the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties, see CBD, arts 2 and 8(j).

[125] ibid art 10(c).

[126] ibid art 18(4).

[127] ABS, *Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices* (n 41) 1.

[128] ibid 2.

[129] ibid.

[130] Nagoya Protocol, art 12(1).

[131] ibid art 12(2).

community protocols,[132] not restrict customary use,[133] and to raise awareness of ILCs' community protocols and procedures[134] have also been provided.[135] Arguably, these requirements shall also cover GR held by ILCs given the inextricable linkage between GR and TK, as discussed in the previous section 1 in this chapter. Thus, albeit abstractly, the Protocol commits itself to protect ILCs' TK and GR in accordance with ILCs' own worldviews and customary rules.[136]

This commitment is unprecedented in binding international environmental treaties and might appear "tangential" vis-à-vis other core provisions on ABS under the Protocol.[137] For instance, Tobin suggests that the issue of the legal status of ILCs' customary laws and community protocol and ways for respecting them in domestic contexts remain extremely unclear and under-explored in scholarly debates.[138] Nevertheless, it poses an opportunity to consider the implication of ILCs' customary laws in the broader context of international law: what is the legal status of their customary laws (as established by ILCs) vis-à-vis national laws (as established by domestic authorities)? This is particularly relevant to consider in light of legal pluralism, which recognises the legitimacy of both.[139] By acknowledging the co-existence of overlapping normative structures, legal pluralists essentially promote heterogeneous sources of legality and authority of law; therefore, acknowledge non-State actors as norm generating subjects as well.[140] With respect to the Nagoya

[132] ibid art 12(3).

[133] ibid art 12(4).

[134] ibid art 21.

[135] Morgera, Tsioumani and Buck (n 6) 217.

[136] Vermeylen (n 7) 187.

[137] Greiber and others (n 1) 138.

[138] Tobin (n 11) 111.

[139] Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (First edn, Cambridge University Press 2013) 3.

[140] Roderick Macdonald and Martha-Marie Kleinhans, 'What is a Critical Legal Pluralism?' (1997) 12 (2) Canadian Journal of Law and Society, 34.

Protocol, Bavikatte and Robinson have suggested in a rather optimistic manner that Article 12 would see "increased community rights and control over national resources where they are appropriate 'owners' or resources-holders".[141] Strictly speaking, the Nagoya Protocol does not recognise the legitimacy of ILCs' customary laws as equivalent to national laws. Instead, the way in which and the extent to which customary laws shall be taken into consideration need be "in accordance with domestic law" and "as applicable".[142] However, it is possible that the customary laws and community protocols of ILCs could communicate specific rules, needs and aspirations of the communities from the local level to domestic and even international levels through ABS procedures. For instance, PIC could incorporate the local decision-making process within the community and MAT could include terms that are deemed fair and equitable by ILCs themselves. The obligation of Parties to recognise and respect ILCs' customary laws may essentially, although indirectly, assign legal power to customary laws and community protocols to a certain level that supports the premises of legal pluralism. It shall be noted, nevertheless, only few scholarly discussions have addressed the implication of the recognition of ILC's customary laws in the Nagoya Protocol.[143]

There are also practical benefits that might emerge from developing and incorporating ILCs' customary rules and community protocols into national legal frameworks. In a broad context of biodiversity conservation and sustainable development, the wisdom and practical guidance of ILCs are increasingly sought as they may provide insights in terms of sustainably managing natural resources.[144] In a

[141] Kabir Bavikatte and Daniel F. Robinson, 'Towards a Peoples History of the Law: Biocultural Jurisprudence and the Nagoya protocol on Access and Benefit Sharing' (2011) 7 (1) Law, Environment and Development Journal, 46.

[142] Nagoya Protocol, art 12(1).

[143] Tobin (n 11) 111.

[144] P. Ørebech and others (eds), *The Role of Customary Law in Sustainable Development* (2006) 12.

community context, a community protocol could function as a guidebook for outsiders as well as a checklist for community members to discuss and settle ABS-related questions, including authorities and procedures for community PIC and terms of benefit-sharing. [145] Furthermore, Morgera and others have suggested that a participatory process of developing community protocols could enhance the overall organisational capacity of the ILCs, assure inter-community equity and participation and empower collective self-identification. [146] From an interpretative perspective, elaborated customary rules of ILCs may also provide benchmarks for determining whether Parties' obligation are fulfilled, for instance, whether their measures for implementation are indeed "appropriate" or not.

Two main challenges persist with regard to implementation. First, substantial gaps remain in implementing processes with respect to ensuring participation of ILCs in the process of recognising their customary laws. In December 2016, the CBD COP notes the limited progress made in mainstreaming Article 8 (j) into various efforts relating to capacity development and the participation of ILCs, as well as the concerning fact that only a limited number of national biodiversity strategies and action plans even refer to ILCs and their customary sustainable use of GR.[147] In 2017, Parties to the Nagoya Protocol were requested to submit an Interim National Report on their implementation, which contained a question asking whether the country is taking into consideration ILCs' customary laws, community protocols and procedures as provided in Article 12(1). A total of 24 Parties and 1 non-Party State have affirmed that they have taken into consideration ILCs' customary laws, while 24 Parties and 1

[145] Elisa Morgera and Elsa Tsioumani, 'The Evolution of Benefit Sharing: Linking Biodiversity and Community Livelihoods' (2010) 19 (2) Review of European Community & International Environmental Law, 157.

[146] Morgera, Tsioumani and Buck (n 6) 222.

[147] CBD COP Decision XIII/1, 'Progress in the Implementation of the Convention and the Strategic Plan for Biodiversity 2011-2020 and towards the Achievement of the Aichi Biodiversity Targets' (12 December 2016) UN Doc CBD/COP/DEC/XIII/1 paras 8 and 9.

non-Party State reported to the contrary.[148] A number of countries[149] indicate that they are planning to address this issue while developing their ABS measures, including those countries that answered "no" to this question.[150] The majority of the Parties have not yet fully implemented Article 12, notwithstanding a few successful cases.[151] The problem is that there are no internationally established standards and procedures to guide the implementation of Article 12 and it has been approached in various ways at the national level.[152] Second, it remains unclear as to how to ensure compliance with ILCs' customary laws.[153] At the national level, the CBD Working Group on ABS has suggested two approaches to incorporate Indigenous customary laws into domestic legal system: one is to recognise the legitimacy of ILCs' customary laws embodying traditionally established rights; and another is to recognise the rights of ILCs over their TK and GR, in accordance with their customary laws.[154] The first approach renders a part of States' sovereign jurisdiction to authority of ILCs' customary laws, which echoes the premises of legal pluralism. In comparison, the second approach transfers

[148] CBD Subsidary Body on Implementation, 'Global Multilateral Benefit-sharing Mechanism (Article 10) of the Nagoya Protocol' (18 May 2018) UN Doc CBD/SBI/2/5 para 30.

[149] Burkina Faso, Burundi, Democratic Republic of the Congo, Malawi, Mexico, Sweden, Uganda, see ibid para 31.

[150] Botswana, Côte d'Ivoire, Guinea, Guinea-Bissau, Mauritania, Mongolia, Niger, Pakistan, Sudan, Uruguay, see ibid para 32.

[151] It has been observed that many plural-cultural and multi-ethnic states have already enshrined recognition of customary laws in national legal systems, see Brendan Tobin, 'The Role of Customary Law and Practice in the Protection of Traditional Knowledge related to Biological Diversity' in Christoph Antons (ed), *Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property Law in the Asia-Pacific Region* (Aspen Publishers 2009) 15.

[152] For instance, Peru recognises customary rules of the ILCs in the National Potato Park, ABS, *Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices* (n 41) 6. Also, Kenya' Protection of Traditional Knowledge and Cultural Expressions Act (2016) established "moral rights" of TK, which exist independently of ILCs' cultural rights and are inalienable or transferable and incapable of being waived.

[153] The term "compliance" here shall be distinguished from the compliance discussed in chapter four, which concerns Parties' inter-State obligations under the Protocol.

[154] CBD Working Group on ABS, 'Study on Compliance in Relation to the Customary Law of Indigenous and Local Communities, National Law, Across Jurisdictions, and International Law' (6 March 2009) UN Doc UNEP/CBD/WG-ABS/7/INF/5 para 51.

certain standards embedded in the customary laws into domestic legal system and the rights would be integrated and protected when applying domestic laws.[155] Both approaches need time and practice to test their respective feasibility and effectiveness under specific national circumstances. Nevertheless, the issue of protecting ILCs' rights pertaining to their customary laws remain relevant with either approach. Given the rights of especially Indigenous peoples pertaining to customary law are increasingly discussed in the context of international human rights, I will continue the discussion about the legitimacy of ILCs' customary laws and States' obligations to respect it in the subsequent section 3.3.[156]

2.4 Responsibilities of State governments

Since the authority to regulate the exact manner, extent and procedure of access rests with State governments, it is imperative to examine the role of governments and their responsibilities in developing national ABS frameworks and ensuring its functionality. Under the CBD, Parties are obliged to "facilitate access to their genetic resources for environmentally sound uses" and not to "impose restrictions that run counter to the objectives of the CBD".[157] Under the Nagoya Protocol, such facilitative obligations are elaborated at two levels. At the domestic level, Parties are required to establish various institutional arrangements to support access, including national focal points and competent national authorities.[158] At the international level, Parties are required to promote transboundary cooperation[159] and share ABS-related information through the

[155] ibid para 55.

[156] For a discussion of the status of Indigenous peoples' rights to their own legal regimes under international law and the recognition of custom as a source of law in national constitutions, see Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights - Why Living Law Matters* (Routledge 2014) 52.

[157] CBD, art 15(2).

[158] Nagoya Protocol, art 13.

[159] ibid art 11.

Access and Benefit-sharing Clearing-House.[160] Furthermore, Article 8 of the Protocol highlights certain situations in connection with non-commercial research, [161] emergency cases related to human, animal, or plant health[162] and the importance of GR for food security,[163] which call for Parties' special considerations. As a means to complement legislative and regulatory approach to regulate ABS, Article 20 also encourages Parties to support the development and utilisation of voluntary norms, such as codes of conduct, guidelines and best practices and/or standards.[164] This implies that concerted efforts are necessary for achieving the objectives of the Nagoya Protocol from not only governments, but also companies, scientific associations, non-governmental organisations and ILCs that are involved in the ABS transactions. The role of government in this context is also of a facilitative nature, which includes a range of specific responsibilities such as, *inter alia,* awareness raising, capacity-building and promoting best practices.[165] In particular, Article 21 requires Parties to take measure to raise awareness of community protocols and procedures of ILCs[166] and Article 22 provides specific reference to the need to increase capacities of ILCs (with a sharpened focus on women) in relation to ABS and particularly TK associated with GR.[167]

Thus, it is reasonable to conclude that governments of Parties to the Nagoya Protocol are expected to take up a facilitative role in the process of implementing the Protocol. It contains responsibilities to facilitate access while taking into account relevant human rights of ILCs to food, health and customary laws, as well as the specific needs and interests of women within ILCs. The implementation of the

[160] ibid art 17 (1)(a)(iii).

[161] ibid art 8(a).

[162] ibid art 8(b).

[163] ibid art 8(c).

[164] Greiber and others (n 1) 159.

[165] ibid 196.

[166] Nagoya Protocol art 21(i).

[167] ibid art 22(5).

Protocol also involves a multitude of relationships among a variety of stakeholders, including private entities, research institutes and NGOs, as well as ILCs within and beyond States' territorial boarders. These characteristics will be revisited in the following section 3 as I explore the implications of the responsibilities imposed on States by international human rights law with respect to ILCs.

3. Human rights implications on access-related provisions

Previous sections have analysed access-related provisions in the Nagoya Protocol and their implications vis-à-vis the rights of ILCs and the responsibilities of State governments. Based on the potential interaction between the Nagoya Protocol and relevant human rights as highlighted, this section investigates specific international human rights established for IPLCs, as well as the correlated human rights obligations imposed on States. I aim to answer the questions raised at the beginning of this chapter. What are the relevant human rights established at the international level for IPLCs in situations where their GR and TK are sought and accessed? What is the relationship between the ABS rights and the human rights of IPLCs and to what extent they may assist one another in their realisation? What are the relevant obligations imposed upon States by international human rights standards? Three categories of human rights are identified because of their fundamental importance and particular relevance to these questions, namely, the human rights of self-determination, FPIC and cultural rights pertaining to IPLCs' customary laws.

3.1 Right of self-determination

The right of self-determination appears in the Charter of the United Nations as well as the two International Covenants. The ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) establish the right of "all peoples" to

self-determination as their key prerogative in Article 1 with identical provisions, asserting that "by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development",[168] as well as to "freely dispose of their natural wealth and resources" for their own ends.[169] In the time when these instruments were adopted, the right of self-determination was mainly meant as a political and legal tool to achieve decolonisation, which is evident in the text of Article 1(3) of the ICCPR and the ICESCR[170] and the relevant practice of the UN.[171] For instance, in the advisory opinion on the *Namibia* case in 1970, the International Court of Justice (ICJ) recognised the applicability of self-determination as a principle enshrined in the UN Charter to all peoples in colonial situations.[172] The ICJ reiterated this position in the *Western Sahara* case in 1975,[173] where it formally acknowledged the existence of the Indigenous notion of land rights of Western Sahara.[174] Although the original importance of self-determination is rendered to colonial peoples, this right and its implications continue to be relevant and important in the post-colonial era.[175] In a more recent case, *the Israeli Wall* case in 2004, the ICJ reaffirmed that "the right of peoples to self-determination is today a right *erga omnes*", citing the UN Charter

---

[168] ICCPR and International Covenant on Economic, Social and Cultural Rights [adopted 16 December 1966, entered into force 3 January 1976], art 1(1).

[169] ICCPR and ICESCR, art 1(2).

[170] It reads, "State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination".

[171] CERD, 'CERD General Recommendation No. 21: Right to Self-determination' (1996) UN Doc A/51/18 para 4 and *Western Sahara (Advisory Opinion)* [16 October 1975] (ICJ) Rep 12 37. See also Gj Simpson, 'The Diffusion of Sovereignty: Self-determination in the Post-colonial Age' (1996) 32 (2) Stanford Journal Of International Law, 265.

[172] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [21 June 1971] (ICJ) Rep 16 31. See Robert McCorquodale, 'Self-determination: a Human Rights Approach' (1994) 43 International and Comparative Law Quarterly, 858.

[173] *Western Sahara (Advisory Opinion)* (n 171). The Court heard this case at the request of the UN General Assembly.

[174] ibid 40.

[175] Rhona K. M. Smith, *International Human Rights Law* (Eighth edn, Oxford University Press 2018) 296.

and the Human Rights Covenants.[176] Furthermore, the ICCPR General Comment No.12 reckons the right of self-determination as "an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights".[177] Indeed, the right of self-determination is the foundation of many other human rights, including, *inter alia*, political and civil rights such as the right of political participation[178] and minority rights,[179] and economic, cultural and social rights such as the right to national resources[180] and the right to development.[181]

The right of self-determination is in general considered as entailing two dimensions: external and internal. An external claim to self-determination usually concerns a territorial dispute and could be realised by secession aiming for an independent statehood.[182] This dimension of self-determination is conspicuously intertwined with the notion of decolonisation during the 1950s and 1960s.[183] However, its realisation has also been witnessed in the post-Cold War era by non-colonial

---

[176] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [9 July 2004] (ICJ) Rep 136 paras 87 and 88. For more discussion about ICJ and its advisory opinions in these cases, see chapter four section 3.1.4.

[177] HRC, 'CCPR General Comment No.12: Article 1 The Right to Self-determination of Peoples' (13 March 1984) UN Doc HRI/GEN/1/Rev.9 (Vol. II) 1.

[178] ICCPR, art 25. Also International Convention on the Elimination of All Forms of Racial Discrimination [adopted 21 December 1965, entered into force 4 January 1969], art 5(c).

[179] ICCPR, art 27. The HRC has reiterated that the provisions of Art 1 may be relevant in interpretation of other rights protected under the ICCPR, see Smith (n 175) 307.

[180] General Assembly adopted resolution 1803 (XVII) on the "Permanent Sovereignty over Natural Resources" on 14 December 1962. See Javaid Rehman, *International Human Rights Law* (Second edn, Longman 2010) 147.

[181] Declaration on the Right to Development [4 December 1986] UNGA Res A/RES/41/128, pmbl, arts 1 and 5. Arjun K. Sengupta, 'On the Theory and Practice of the Right to Development' (2002) 24 (4) Human Rights Quarterly, 862.

[182] CERD (n 171) para 4. Lea Brilmayer, 'Secession and Self-determination: a Territorial Interpretation' (1991) 16 (1) The Yale Journal of International Law, 178.

[183] *Western Sahara (Advisory Opinion)* (n 171) para 37. ; Frederic L. Kirgis, 'The Degrees of Self-Determination in the United Nations Era' (1994) 88 (2) American journal of international law, 305.

peoples from, for instance, the former Union of Soviet Socialist Republics (USSR), Czechoslovakia and Yugoslavia.[184] Indeed, the Human Rights Committee (HRC) confirms that the principle of self-determination applies to all peoples—not only to colonised peoples.[185] Overall, external self-determination has not been widely accepted in a political sense as it poses potential threats to the territorial integrity of States.[186] The internal dimension of self-determination includes the right of all peoples to pursue freely their economic, social and cultural development without outside interference.[187] From a people's perspective, it follows that the right shall be understood not only as the attainment of independent statehood, but also as the assertion of identity, language, tradition, self-management and autonomy within States' territories.[188] This dimension of self-determination has attracted much attention especially in an Indigenous context. For instance, the HRC has affirmed that the Indigenous Sami people in Finland and Chile are entitled to internal self-determination in the context of natural resources extraction.[189] Since internal self-determination is less politically controversial (and thus more pragmatically accessible), it has been more widely used by legal scholars and Indigenous advocates when referring to various forms of Indigenous rights, including, self-government, autonomy, territorial integrity, lands and resources.[190] Nevertheless, it is worth highlighting that the

[184] Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Third edn, Oxford University Press 2013) 159.

[185] HRC, 'Comments of the Human Rights Committee on Azerbaijan' (3 August 1994) UN Doc CCPR/C/79/Add.38 para 6.

[186] Joseph and Castan (n 184) 159 and Catherine J. Iorns, 'Indigenous Peoples and Self-Determination: Challenging State Sovereignty' (1992) 24 (2) Case Western Reserve Journal of International Law, 252.

[187] CERD (n 171) para 4.

[188] Anaya (n 13) 86.

[189] HRC, 'Concluding Observations of the Human Rights Committee on Finland' (2 December 2004) UN Doc CCPR/CO/82/FIN para 17 and HRC, 'Concluding Observations of the Human Rights Committee on Chile' (18 May 2007) UN Doc CCPR/C/CHL/CO/5 para 19.

[190] Ricardo Pereira and Orla Gough, 'Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-determination of Indigenous Peoples under International Law' (2014)

scholarly debate continues as to the nature of internal self-determination and the level of autonomy which can be demanded to satisfy that right.[191]

A major problem of the term is the lack of official definition of the right-holders—who are the "peoples"? Various characteristics of peoples have been put forward, such as common historical tradition, racial or ethnic identity, territorial connection, common economic life and a certain minimum number of population.[192] However, no human rights instrument explicitly defines the concept and no universally accepted list of characteristics of "peoples" exists.[193] Furthermore, as the HRC determines that self-determination is not a right cognisable under the Optional Protocol of ICCPR,[194] there is very limited jurisprudence on this matter offered by treaty monitoring bodies.[195] The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as adopted in 2007 is a milestone of the international recognition of Indigenous peoples and their human rights.[196] Affirming the right of Indigenous peoples to self-determination (even though in a limited form),[197] the UNDRIP

14 (2) Melbourne Journal of International Law, 156 and Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press 2010) 67.

[191] Smith (n 175) 301.

[192] McCorquodale (n 172) 866 and Yoram Dinstein, 'Collective Human Rights of Peoples and Minorities' (1976) 25 (1) International and Comparative Law Quarterly, 104.

[193] Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 (2) International and Comparative Law Quarterly, 261.

[194] HRC, 'CCPR General Comment No. 23: Article 27 (Rights of Minorities)' (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5 para 3.1.

[195] The HRC has made clear that self-determination is a collective right, which cannot be claimed by individuals. See *Lubicon Lake Band v Canada* [26 March 1990] (HRC) UN Doc Supp. No. 40 (A/45/40) paras 13.3 and 32.1. *John Wilson v Australia* [1 April 2004] (HRC) UN Doc CCPR/C/80/D/1239/2004 (2004) para 4.3.

[196] Steve Allen and Alexandra Xanthaki, 'Introduction' in Steve Allen and Alexandra Xanthaki (eds), *Reflections on the United Nations Declaration on the Rights of Indigenous Peoples* (Hart Publication 2011) 1.

[197] In the sense that it does not recognise the "strong" forms of self-determination, including external self-determination and internal self-determination that provide for significant autonomy for indigenous peoples. See Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 (1) European Journal Of International Law, 142.

provides a detailed list of rights that constitute the minimum standards for the survival, dignity and well-being of Indigenous peoples around the world.[198] Reiterating the political, economic, social and cultural aspects of the right of self-determination, the UNDRIP highlights that Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to "their internal and local affairs".[199] The UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples, James Anaya, has suggested that the articulation of the right of self-determination in the UNDRIP shed light on the understanding of "Indigenous peoples" vis-à-vis their specific historical, cultural and social circumstances.[200] Smith also argues that the instrument indicates a shift in the focus to re-centre on self-determination in international human rights law.[201] A number of mechanisms, for example, FPIC, has been envisaged in the UNDRIP as a means in furtherance of their self-determination.[202]

Thus, it can be observed that the right of self-determination is of fundamental importance in international human rights law, based on which all peoples are entitled to determine their political status, freely pursue their economic, social and cultural development, and dispose of their natural wealth and resources. The principle of State sovereignty over natural resources, as discussed in the previous section 2.1, shall thus respect people's rights to self-determination. In light of States' responsibility to safeguard and fulfil the right of self-determination, it can be interpreted that the principle takes shape in a human right obligation to exercise State sovereign rights for

---

[198] United Nations Declaration on the Rights of Indigenous Peoples [13 December 2007] UNGA Res 61/295, art 43.

[199] ibid art 4.

[200] HRC, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, S. James Anaya' (11 August 2008) UN Doc A/HRC/9/9 para 86.

[201] Smith (n 175) 304.

[202] As they can consent or veto proposed projects affecting their lands, see CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights of Colombia' (6 December 2001) UN Doc E/C.12/1/Add.74 para 12/33. Smith (n 175) 305.

the purpose of promoting national development and ensuring the well-being of all its peoples.[203] While it remains undefined, the term "peoples" unquestionably includes all persons within a State and all the groups of persons such as minorities and Indigenous peoples. In particular, Indigenous peoples have been bestowed with the general applicability of universal human rights norms and principles that also takes into account the specific Indigenous historical, cultural and social circumstances. As this thesis addresses IPLCs and their human rights in the ABS context of the Nagoya Protocol, I focus on the internal aspects of self-determination in connection with the rights of IPLCs to lands, resources, culture, development and those pertaining to FPIC and customary laws, and their implications on States obligations to adopt national laws and policies, comply with international standards and cooperate. I do not discuss the external aspects of self-determination that addresses issues of accession to independent statehood, although it might be relevant for IPLCs in cases where they make territorial claims.[204]

3.2 Right to free, prior, and informed consent

Free, prior, and informed consent (FPIC) refers to engagement and participation of IPLCs in decision-making process of projects that might affect their rights, often concerning development projects conducted by extractive industries such as logging

[203] Daniëlla Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge University Press 2015) 58 and Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 (4) Modern Law Review, 599.

[204] Scholars have generally noted that the self-determination rhetoric has been of limited utility to most non-colonial oppressed peoples and that it has not been of much help for such groups in their territorial claims. See Rupert Emerson, 'Self-Determination' (1971) 65 American journal of international law, 465 and Joshua Castellino, 'Territorial Integrity and the Right to Self-Determination: An Examination of the Conceptual Tools' (2008) 33 (2) Brooklyn Journal of International Law, 556.

and mining.[205] With a growing significance in safeguarding especially Indigenous rights, FPIC is integrated in many international fora and development agendas. For instance, the CBD, the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), the World Conservation Union, the World Bank and the UN Educational, Scientific and Cultural Organization (UNESCO), dealing with issues ranging from biological resources and TK, to development and resettlement policies, natural conservation plans and protection of Indigenous cultural heritage.[206] These developments largely are the consequence of the ongoing advocacy by Indigenous peoples to have their fundamental human rights recognised and respected, especially those pertaining to lands, natural resources and, increasingly, knowledge and cultures.[207] Indeed, Doyle and Barelli have demonstrated that FPIC constitutes an emerging principle of international human rights law and its role in safeguarding IPLCs' fundamental human rights is increasingly recognised by many international organisations, judicial and quasi-judicial bodies and numerous domestic laws.[208] Anchoring their examination of FPIC to the UNDRIP and the International Labour

[205] Suzanne A. Spears and Lisa J. Laplante, 'Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector' (2008) 11 Yale Human Rights and Development Law Journal, 70.

[206] There is extensive literature on FPIC in these contexts, see, *inter alia*, Joel-David Dalibard and Toshiyuki Kono, 'Prior Informed Consent: Empowering the Bearers of Cultural Traditions' in Toshiyuki Kono (ed), *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development* (Intersentia 2009) and other contributions in this book, Britta Rudolff and Susanne Raymond, 'A Community Convention? An Analysis of Free, Prior and Informed Consent Given under the 2003 Convention' (2013) 8 International Journal Of Intangible Heritage, 153,Stuart R. Butzier and Sarah M. Stevenson, 'Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent' (2014) 32 (3) Journal of Energy & Natural Resources Law, 297 and Fergus MacKay, 'Universal Rights or a Universe unto Itself--Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples' (2002) 17 (3) American University International Law Review, 533.

[207] Joji Cariño, 'Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice' (2005) 22 (1) Arizona Journal of International and Comparative Law, 20.

[208] Cathal M. Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (Routledge 2014) 71 and Mauro Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (2012) 16 (1) The International Journal of Human Rights, 2.

Organization in 1989,[209] as well as existing jurisprudence and evolving international policies and practices, Doyle and Barelli argue that FPIC is founded on substantive human rights such as the right of self-determination and property rights to lands and resources.[210] However, while the tie between FPIC as a procedural right and IPLCs' substantive human rights are now widely established in scholarly discussions, it is necessary to note that the extent to which human rights norms may provide substantive support for Indigenous peoples' claims to FPIC is much greater than those of local communities.[211]

This section focused on FPIC as a human rights norm of IPLCs and investigate its implications for the access-related provisions of the Nagoya Protocol. The analysis builds upon the previous section 2.2, where PIC is examined as a key procedural mechanism to ensure ILCs' rights and interests under the Nagoya Protocol. In particular, I look at the international standards as enshrined in the UNDRIP and the Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries adopted under the International Labour Organization (ILO Convention 169).[212] I also examine the jurisprudence of regional human rights courts and three UN human rights treaties bodies—the HRC, the Committee on Economic, Social and

[209] The ILO Convention 169 is the major binding international convention concerning Indigenous peoples before the UNDRIP, Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries [adopted 27 June 1989, entered into force 5 September 1991] ILO C169.

[210] Doyle (n 208) 101 and Barelli (n 208) 11.

[211] See, *inter alia*, Caroline E. Foster, 'Articulating Self-determination in the Draft Declaration on the Rights of Indigenous Peoples' (2001) 12 (1) European Journal Of International Law, 148, Mary Ellen Turpel, 'Indigenous People's Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition' (1992) 25 (3) Cornell International Law Journal, 593; Daniel Barstow Magraw and Lauren Baker, 'Globalization, Communities and Human Rights: Community-Based Property Rights and Prior Informed Consent' (2007) 35 Denver Journal of International Law and Policy, 419 and Helen Quane, 'The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights?' in Steve Allen and Alexandra Xanthaki (eds), *Reflections on the United Nations Declaration on the Rights of Indigenous Peoples* (Hart Pub. 2011) 263.

[212] ILO Convention 169.

Cultural Rights (CESCR) and the Committee on the Elimination of Racial Discrimination (CERD).[213] The articulation of FPIC as a human rights norm provided in these contexts shines a light on the understanding of three key questions: A) what is a human right to FPIC? B) How does it relate to other human rights of IPLCs, for instance, the right of self-determination, culture, participation, property and development? And C) what are the implications of the right to FPIC and its interrelations with other human rights in the ABS context of the Nagoya Protocol?

3.2.1 International human rights standards: the ILO Convention 169 and the UNDRIP

FPIC is not always explicit in international human rights instruments. Some human rights instruments speak broadly of a minority's right to participate in decisions that might affect them. For instance, the ICCPR General Comment No. 23 on the rights of minorities notes that the enjoyment of cultural rights under Article 27 of the ICCPR "may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them".[214] The CERD General Recommendation No. 23 on the rights of Indigenous peoples also call upon States Parties to "ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent".[215] Similarly, the ILO Convention 169[216] requires State governments to conduct consultation and to facilitate Indigenous and tribal peoples to "freely participate in all

[213] They monitor the implementation of the ICCPR, the ICESCR and the ICERD respectively.

[214] HRC, *CCPR General Comment No. 23* (n 194) para 7.

[215] CERD, 'CERD General Recommendation No. 23: Indigenous Peoples' (1997) UN Doc A/52/18 para 4(b).

[216] As discussed in section 2.1.2 of chapter one, this treaty does not have a large number of State Parties but has proved to be influential in elaborating indigenous and tribal rights in both international law-making process and in scholarly discussions, see Anaya (n 13) 58.

levels of decision-making", "with the objective of achieving agreement or consent".[217] Thus, even though these instruments do not use the language of FPIC, it could be argued that they in fact incorporate the essential elements of FPIC, for instance, effective participation and informed consent, in their establishments of human rights to varying degrees.[218] Barelli has suggested that the requirements of consultation and participation in the Convention 169 should be read in conjunction with other provisions in the treaty, especially those establish the rights of Indigenous peoples pertaining to their lands, resources and culture, which include a strong demand for ensuring effective participation in the use, management and conservation of these resources.[219] This line of thinking could also apply to the reading of the General Comments and Recommendations issued by human rights treaty bodies as well, that the requirements pertaining to FPIC is in fact interrelated to other fundament human rights of IPLCs. This point is articulated in the following section 3.2.3.

On the contrary, the UNDRIP addresses explicitly the proactive role of FPIC in protecting Indigenous peoples' human rights. Unlike the ILO Convention 169, the UNDRIP is not a binding instrument. There are legal scholars, including Anaya and Wiessner, hold strongly that the UNDRIP is binding to the extent that the content of the Declaration is supported by the factual State practice (even of the counties that voted against) and the general *opinio juris*.[220] Wisessner suggests that the key provisions of the UNDRIP, or at least the principles embedded in it, reflect pre-existing

---

[217] ILO Convention 169, art 6.

[218] This point can also be supported by the decision of the ILO Governing Body, see ILO Governing Body, 'Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL)' (2001) GB. 282/14/2 para 39.

[219] ILO Convention 169, arts 13 and 15. Barelli (n 208) 6.

[220] S James Anaya and Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment* (JURIST Forum, 2007) 7 <http://www.jurist.org/forum/2007/10/un-declaration-on-rights-of-indigenous.php> accessed 27/11/2017.

customary international law and, to some extent, generate new customary international rules.[221] There are also scholars who are more cautious about this perspective, for instance, Xanthaki and Davis, who have suggested that the above arguments are rather premature and over-ambitious.[222] Although the normative status of the UNDRIP might be controversial in scholarly discussions, we should not overlook or underestimate the impacts of the UNDRIP in both practical and normative terms. As will be demonstrated in the next section, its provisions on FPIC have greatly influenced the practices of the most important human rights treaty bodies and several regional human rights courts towards the understanding Indigenous peoples' rights to lands, resources and culture.

Specifically, in relation to Indigenous rights of land and territories, Article 10 of the UNDRIP stresses that Indigenous peoples shall not be relocated without their FPIC.[223] Article 32 further requires States to consult and cooperate in good faith with Indigenous peoples through their own representative institutions in order to obtain FPIC prior to the approval of any project affecting their lands or territories and other resources.[224] Pertinent to environmental protection, States are required to take effective measures to prevent storage or disposal of hazardous materials from taking place in the lands or territories of Indigenous peoples without their FPIC.[225] The UNDRIP also highlights the States' obligation to consult with Indigenous peoples in order to obtain their FPIC before adopting and implementing any domestic legislative

[221] Siegfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) 22 (1) European Journal Of International Law, 130.

[222] Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10 (1) Melbourne Journal of International Law, 36 and Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 Australian International Law Journal, 19.

[223] UNDRIP art 10.

[224] ibid art 32 (2).

[225] ibid art 29 (2).

or administrative measures that may affect them.[226] Furthermore, the UNDRIP imposes obligations on States to ensure restitution or compensation for the lands and resources which are traditionally owned or used by Indigenous peoples, if such lands or resources were occupied or used without Indigenous peoples' FPIC.[227] Finally, by recognising Indigenous peoples' right to practise and revitalise their cultural traditions and customs, Article 11 calls upon States to provide redress with respect to their cultural, intellectual, religious and spiritual property taken without FPIC or in violation of their laws, traditions and customs.[228]

Thus, the UNDRIP makes clear that FPIC functions as an important procedural safeguard to Indigenous peoples in the contexts of lands use, relocation, resources exploitation, environmental protection and the development of national laws and policies that might affect Indigenous peoples' rights. Meanwhile, as enshrined in Article 11 and 28 of the UNDRIP, States are obliged to provide redress and compensation for lands, resources, cultural and intellectual property of Indigenous peoples that have been taken without their FPIC. This remedial function of FPIC needs to be linked the "historic injustices" suffered by Indigenous peoples, as recognised in the paragraphs of the Preamble.[229] In Anaya's words, because Indigenous peoples are the peoples who "have suffered oppression at the hands of others", their right to self-determination also requires the international community and States to reverse and redress the past violations to Indigenous rights, in addition to States' responsibility to respect and reconcile the political, economic, social and cultural relationship with

[226] ibid art 19.

[227] ibid art 28.

[228] ibid art 11.

[229] In the Preamble of the UNDRIP, the General Assembly expresses concerns "that indigenous peoples have suffered from historic injustices as a result of, *inter alia*, their colonization and dispossession of their lands, territories and resources".

Indigenous peoples.[230] In line with the ILO Convention 169, Article 18 of the UNDRIP also highlights the right of Indigenous people to participate in decision-making in matters which would affect their rights.[231] In this connection, Anaya and Xanthaki argue that, as the UNDRIP anchors the Indigenous peoples' right to participation to the internal aspect of self-determination, it is quite significant that FPIC then indirectly connects with the most fundamental human rights of Indigenous peoples.[232] To push this argument further, it follows that the essential reason to establish mechanisms like FPIC is not only because the importance of preserving their distinct culture or promoting social and economic development, but also because the paramount demands of humanity to respect who they are and to assign that identity with universal human rights, as equally applied for other peoples.[233] In order to shed light on the extent to which this might be realised in specific contexts, I look at the practices of regional human rights courts and international human rights treaties bodies in the following section, after a brief investigation of the definition of FPIC and its relationship with its ABS counterpart "PIC".

3.2.2 Definition of FPIC and its relationship with PIC

The most commonly cited definition of FPIC is provided by the UN Permanent Forum on Indigenous Issues (PFII) — an advisory body to the UN Economic and Social Council that provides expert advice and recommendations on Indigenous issues. In its 2005 Report on FPIC and Indigenous peoples, PFII elaborates the key elements of the term FPIC by unpacking the questions of what is FPIC, when and how it should be

---

[230] S James Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA 2009) 196.

[231] UNDRIP, art 18.

[232] ibid art 3 and pmbl. Anaya (n 230) 193 and Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (n 222) 30.

[233] UNDRIP, art 2.

obtained and from whom.[234] According to this report, "free" should imply no coercion, intimidation or manipulation. "Prior" should imply that consent must be sought sufficiently in advance of any authorisation or commencement of activities, and that the relevant agents should guarantee enough time for the Indigenous consultation/consensus processes to take place. "Informed" implies that Indigenous peoples should receive satisfactory information in relation to certain key areas, including the nature, size, pace, reversibility and scope of the proposed project, the reasons for launching it, its duration, and a preliminary assessment of its economic, social, cultural and environmental impact. Crucially, this information should be accurate and in a form that is accessible, meaning that Indigenous peoples should fully understand the language used. Finally, "consent" should be intended as a process by which consultation and participation represent the central pillars.[235] Under the CBD, FPIC has also been defined in the Mo'otz Kuxtal Guidelines in the context of access to IPLCs' TK in the following terms:

> *Free* implies that Indigenous peoples and local communities are not pressured, intimidated, manipulated or unduly influenced and that their consent is given, without coercion;
>
> *Prior* implies seeking consent or approval sufficiently in advance of any authorization to access traditional knowledge respecting the customary decision-making processes in accordance with national legislation and time requirements of Indigenous peoples and local communities;
>
> *Informed* implies that information is provided that covers relevant aspects, such as: the intended purpose of the access; its duration and scope; a preliminary assessment of the likely economic, social, cultural and environmental impacts, including potential risks; personnel likely to be

[234] PFII, 'Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples' (17 February 2005) UN Doc. E/C.19/2005/3 paras 46 -50.

[235] Barelli (n 208) 2.

> involved in the execution of the access; procedures the access may entail and benefit-sharing arrangements;
>
> *Consent* or *approval* is the agreement of the Indigenous peoples and local communities who are holders of traditional knowledge or the competent authorities of those Indigenous peoples and local communities, as appropriate, to grant access to their traditional knowledge to a potential user and includes the right not to grant consent or approval;
>
> *Involvement* refers to the full and effective participation of Indigenous peoples and local communities, in decision-making processes related to access to their traditional knowledge. Consultation and full and effective participation of Indigenous peoples and local communities are crucial components of a consent or approval process.[236]

This elaboration under the CBD, in particular the shared understanding of the elements of "free", "prior", "informed" and "consent" with the ones adopted by the PFII, supports the observation of legal scholars like Savaresi that the concept of PIC in the ABS framework overlaps with the concept of FPIC in the international human rights law.[237] Admittedly, the ABS wording also includes other terms such as "approval and involvement", which according to Morgera and others, reflects the reluctance by some CBD Parties to fully endorse the right to community PIC as developed in the international human rights law and enshrined in the UNDRIP.[238] Thus, it can be observed that the core of the concepts is almost indistinguishable in both the ABS and human rights contexts, in the sense that PIC and FPIC, as a procedural prerequisite for the realisation of their respective objectives, contain certain standards and criteria.[239] This normative overlapping provides a crucial ground for a mutually supportive interpretation and implementation of PIC/FPIC-related rules. Yet, the key uncertainty

[236] XIII/18 (n 76) para 7.

[237] Savaresi (n 6) 53.

[238] Morgera, Tsioumani and Buck (n 6) 152.

[239] Dutfield, 'Prior Informed Consent and Traditional Knowledge in a Multicutural World' (n 82) 263.

for applying the principle of mutual supportiveness is that State Parties of the Nagoya Protocol are not obliged to incorporate human rights standards of FPIC and the extent they might take the human rights elaboration of the term into consideration is largely up to their discretion. Another risk of interpreting and implementing PIC/FPIC is with the relatively weaker status of "local communities" recognised in international law.[240] Standards of FPIC that have been established for Indigenous peoples, especially those based on the assertation of the right of self-determination, do not directly apply in cases where local communities are concerned. However, it is still necessary to focus on the potential for a synergetic and systemic interpretation and implementation of PIC/FPIC in both areas of international law. For this reason, the following sections explore the elaboration of FPIC in the judicial practices of international human rights law.

3.2.3 FPIC in the jurisprudential interpretation of UN human rights treaty bodies and regional human rights courts

In this section, I investigate the jurisprudence of three UN human rights treaties bodies—the HRC, the CESCR and the CERD—and regional human rights courts with respect to IPLCs' right to FPIC. An expansive jurisprudential interpretation of the human right to FPIC exists and its evolution is conspicuous through the rulings in some landmark cases, such as, *Case of the Saramaka People v Suriname,*[241] the *Endorois* case*,*[242] the *Länsman et al v Finland* case [243] and the *Poma Poma v Peru* case.[244] The trend of establishing FPIC as a procedural human rights requirement of IPLCs in connection with their substantive human rights to lands, resources, culture and

[240] As discussed in the previous section 2 of chapter one.

[241] *Case of the Saramaka People v Suriname* [28 November 2007] (Inter-American Court of Human Rights) IACHR Series C no 172.

[242] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* [2010] (ACHPR) 276/2003.

[243] *Länsman et al v Finland* [26 October 1994] (HRC) UN Doc CCPR/C/52/D/511/1992 (1994).

[244] *Poma Poma v Peru* [24 April 2009] (HRC) UN Doc CCPR/C/95/D/1457/2006.

development is present. The articulation of States' duty to seek FPIC (sometimes more assertively as to "obtain" FPIC), adopt legislation on FPIC and recognise the importance of FPIC vis-à-vis IPLCs is also evident in numerous Concluding Observations provided by the HRC, the CESCR and the CERD. As will be demonstrated, the UNDRIP as adopted in 2007 has a significant impact on pushing this trend forward in the sense that the role and importance of FPIC is ever more enunciated. This supports the argument made before that although the UNDRIP is not a binding instrument, it nevertheless generates significant normative and practical impacts in international human rights law with respect to IPLCs. However, I acknowledge that the jurisprudential articulation of IPLCs' right to FPIC is one thing, while the realisation in specific political, social and economic contexts could be quite another. There is limitation of forming a perspective of human rights law and its national implementation replying on the reports submitted by States,[245] and the human rights courts and tribunals can only cover a fraction of human rights violations towards IPLCs around the globe. [246] However, to clarify the normative development as enshrined in the judicial practices and identify how international law could influence the interpretation of States' responsibilities vis-à-vis IPLCs are imperative tasks. Investigating the possibilities and necessities of a mutually supportive interpretation, this section unpacks how the human rights standards of FPIC may shed light on interpreting the PIC-related provisions in the Nagoya Protocol, as well as how the ongoing implementation of the ABS rules of the Nagoya Protocol may complement the realisation of IPLCs' human rights.

---

[245] For a detailed discussion about the UN human rights periodic review mechanism and its limitations, see Allehone Mulugeta Abebe, 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council' (2009) 9 (1) Human Rights Law Review, 7 and Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6 (1) Human Rights Law Review, 37.

[246] James Cavallaro and Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-first Century: the Case of the Inter-American Court' (2008) 102 (4) American journal of international law, 770.

3.2.3.1 Human Rights Committee

The HRC monitors the implementation of the ICCPR through reports submitted by its State Parties[247] and considers inter-State[248] or individual[249] complaints about human rights violations. The HRC has addressed the issue of FPIC primarily through providing interpretation of minority's right to culture, as enshrined in Article 27 of the ICCPR. Specifically, based on the observation that "culture manifests itself in many forms", the HRC highlights that the understanding of the cultural rights of Indigenous peoples should be dynamic.[250] It further addresses the importance of lands and resources as they support Indigenous ways of life[251] and urges States, to ensure the enjoyment of Indigenous peoples' cultural rights and to have "positive legal measures to ensure the effective participation" in place.[252] In this light, the HRC suggests that the right to culture entails a duty of States to consult with Indigenous peoples prior to any proposed initiatives that are likely to affect them. This can be observed in two cases regarding violations of Sami peoples' cultural rights—*Länsman et al v Finland*[253] and *Jouni E. Länsman et al. v Finland*[254]—as well as a number of Concluding Observations.[255] The following paragraphs discuss these cases in detail.

---

[247] ICCPR, art 28.

[248] ibid art 41.

[249] Optional Protocol to the International Covenant on Civil and Political Rights [adopted 19 December 1966, entered into force 23 March 1976] 999 UNTS 171.

[250] HRC, *CCPR General Comment No. 23* (n 194) para 7.

[251] For example, it considers the possibility that some way of life may closely associated with territory and use of its resources, see ibid para 3.2. The HRC then highlights this association via calling for particular attention when implement consultancy and FPIC, see HRC, 'Concluding Observations on the Sixth Periodic Report of Costa Rica' (21 April 2016) UN Doc CCPR/C/CRI/CO/6 para 42(b).

[252] HRC, *CCPR General Comment No. 23* (n 194) para 7.

[253] *Länsman et al v Finland* (n 243).

[254] *Jouni E. Länsman et al. v Finland* [30 October 1996] (HRC) UN Doc CCPR/C/58/D/671/1995 (1996).

[255] Under the observation of the hydroelectric and other development project that might affect the traditional way of life of the Mapuche and other Indigenous communities in Chile, the HRC stresses that, "when planning actions that affect members of indigenous communities, the State party must pay primary attention to the sustainability of the

The authors of both communications submitted that the resource extraction activities conducted by private companies, namely, stone quarrying and logging, threatened their traditional way of life—reindeer herding; therefore, violated their rights to culture as enshrined in Article 27 of ICCPR. The Finnish Government had issued permits for these activities and claimed that in both cases, the Sami community has been consulted and their concerns accommodated. The HRC held that the Sami's right to culture under Article 27 of ICCPR had not been violated, due to consultation and the limited impact of the extraction activities on their traditional practice of reindeer husbandry.[256] Conspicuously the HRC has considered Finland's duty to consult with the Sami people fulfilled in both communications. It implies that the Sami people's cultural right does impose a duty for their residential State to conduct consultation; however, Indigenous opinion would not necessarily influence the final decision on the concerned activity. Barelli has warned that this could suggest that, as far as the impact of such projects on Indigenous cultural practices is not disastrous, no right would be considered violated.[257] Thus, even though the HRC does spell out that the aim of such a consultation process is for the effective participation of Indigenous peoples in the decision-making process in accordance with their right to self-determination and the right to culture,[258] the right to culture as accorded to minorities and Indigenous peoples appears passive rather than proactive. Arguably, this is due to the lack of substantial recognition of the Sami's rights to land as a property, rather than

Indigenous culture and way of life and to the participation of members of Indigenous communities in decisions that affect them, see HRC, 'Concluding Observations of the Human Rights Committee on Chile' (24 March 1999) UN Doc CCPR/C/79/Add.104 (1999) para 22. Also regarding disputes between Indigenous peoples and development project that are related to land, the HRC required Chile to "consult indigenous communities before granting licences for the economic exploitation of disputed lands and guarantee that in no case will exploitation violate the rights recognized in the Covenant", see HRC, *Concluding Observations of the Human Rights Committee on Chile* (n 189) para 19 (c).

[256] *Jouni E. Länsman et al. v Finland* (n 254) para 10.5.

[257] Barelli (n 208) 8.

[258] HRC, 'Concluding Observations of the Human Rights Committee on Mexico' (27 July 1999) UN Doc CCPR/C/79/Add.109 para 22. Emphasis added.

mere cultural interests.[259] As will be discussed in greater detail in chapter three section 2.3, property rights vis-à-vis ILCs' lands and resources could provide a much stronger normative ground as to impose procedural obligations on States such as consultation, FPIC and even benefit-sharing.[260]

States' duty with respect to FPIC has been gradually recognised in addition to the duty to consultation by the HRC: the use of the term FPIC is especially perceptible after the adoption of the UNDRIP in 2007. In 2008, the HRC voices concern regarding the absence of a consultation process to secure FPIC to the exploitation of natural resources on Indigenous communities' lands.[261] In 2009, the HRC issues its decision on the *Poma Poma v Peru* case,[262] in which the water diversion project authorised by the Peruvian Government has been found in violation of the right to enjoy cultural life of members of the Aymara community, because it destroys the natural surroundings for the community to continue their traditional economic activity—raising llamas. The HRC stresses that a minority or Indigenous community must be afforded the opportunity to participate in the decision-making process in relation to projects affecting their culturally significant economic activities. It also elaborates that such participation must be effective, "which requires not mere consultation but the *free, prior and informed consent* of the members of the community".[263] In the Concluding Observations issued by the HRC after the *Poma Poma v Peru* case, FPIC has been explicitly and consistently addressed. Specifically, the HRC considerers that States

---

[259] S. James Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources' (2005) 22 (1) Arizona Journal of International and Comparative Law, 12.

[260] See the discussion in section 2.3 of chapter three.

[261] HRC, 'Concluding Observations of the Human Rights Committee on Panama' (17 April 2008) UN Doc CCPR/C/PAN/CO/3 para 21. With slight change of wording, see HRC, 'Concluding Observationsof the Human Rights Committee on Nicaragua' (12 December 2008) UN Doc CCPR/C/NIC/CO/3 para 21.

[262] *Poma Poma v Peru* (n 244).

[263] ibid para 7.6. Emphasis added.

bear a duty to adopt national legislation regarding prior consultations "with a view to guaranteeing" the FPIC of community members[264] and Indigenous peoples need to be consulted properly in the process of adoption of law on consultation.[265] Guidance on how to implement consultation and FPIC has been elaborated in more recent documents, including establishing representative institutions [266] and councils of Indigenous peoples.[267] Thus, a trend of articulating States' duty to seek FPIC, adopt legislation on FPIC and recognise the importance of FPIC in connection with substantive human rights to culture and lands is present. However, what is considered a "consent" is not defined and there is no procedural clarity as to the decision-making process within the IPLCs in order to reach a consent. Most problematically, it is not clear whether States' duties to seek FPIC contains the duty to ensure the consent is eventually obtained. And when a consent cannot be reached, and whether the concerned IPLCs has a veto power on the concerned project or not.[268] As discussed above, neither the UNDRIP or ILO Convention 169 goes as far as to grant Indigenous peoples a veto power while establishing their right to participation.[269] Indeed, how, and to what extent the human rights of FPIC can be framed as to include a veto power is still a very controversial matter.[270]

---

[264] HRC, 'Concluding Observations of the Human Rights Committee on Colombia ' (4 August 2010) UN Doc CCPR/C/COL/CO/6 25.

[265] HRC, 'Concluding Observations on the Sixth Periodic Report of Ecuador' (11 August 2016) UN Doc CCPR/C/ECU/CO/6 para 36(a)(b). See also HRC, 'Concluding Observations on the Seventh Periodic Report of Colombia' (17 November 2016) UN Doc CCPR/C/COL/CO/7 para 43(b).

[266] HRC, 'Concluding Observations on the Third Periodic Report of the Plurinational State of Bolivia' (6 December 2013) UN Doc CCPR/C/BOL/CO/3 para 25.

[267] HRC, 'Concluding Observations on the Sixth Periodic Report of Chile' (13 August 2014) UN Doc CCPR/C/CHL/CO/6 para 10(b).

[268] Barelli (n 208) 8.

[269] ibid 21.

[270] For instance, Doyle has argued that to equate FPIC to a veto power is a "reductionist" perspective, whic is unhelpful and alarmist and "misses the fundamental role of FPIC in transforming historically unjust and discriminatory relationship between States and indigenous peoples". See Cathal M. Doyle, 'The Evolving Duty to Consult and

3.2.3.2 Committee on Economic, Social and Cultural Rights

The CESCR is the monitoring body of the implementation of the ICESCR. Similar to the practice of the HRC, it also has addressed State Parties' duties with respect to consultation and FPIC for protecting cultural human rights, in light of the importance of maintaining the world's cultural diversity.[271] Evident in a number of its Concluding Observations issued pre-UNDRIP, while recognising the importance of consultation and FPIC for ensuring the participation of Indigenous peoples and minority groups, the CESCR provides no explicit affirmation on State's duty to obtain FPIC.[272] In 2009, the CESCR adopts the General Comment No. 21 on the right of everyone to take part in cultural life,[273] which includes several explicit references to the ILO Convention 169 and the UNDRIP on issues concerning Indigenous peoples.[274] Listing specific rights accorded to Indigenous peoples by these two instruments such as the right to maintain, control, protect and develop their TK and GR, the CESCR demands that State Parties should respect the principle of FPIC of Indigenous peoples "in all matters covered by their specific rights".[275] Additionally, in the context of ensuring minority and Indigenous peoples' right to take part in their cultural life, the CESCR highlights

---

Obtain Free Prior and Informed Consent of Indigenous Peoples for Extractive Projects in the United States and Canada' in Isabel Feichtner, Markus Krajewski and Ricarda Roesch (eds), *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (Springer International Publishing 2019) 211,

[271] CESCR, 'CESCR General Comment No. 21: Right of Everyone to Take Part in Cultural Life' (21 December 2009) UN Doc E/C.12/GC/21 para 1.

[272] See CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights of Colombia* (n 202) para 33, CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights of Brazil' (26 June 2003) UN Doc E/C.12/1/Add.87 para 58, CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights of Ecuador' (7 June 2004) UN Doc E/C.12/1/Add.100 para 35, CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights of Canada' (22 May 2006) UN Doc E/C.12/CAN/CO/4 para 38 and CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights of Mexico' (9 June 2006) UN Doc E/C.12/MEX/CO/4 E.

[273] As enshrined in art 15 (a) of the ICESCR, see CESCR, *CESCR General Comment No. 21* (n 271).

[274] Barelli (n 208) 7.

[275] CESCR, *CESCR General Comment No. 21* (n 271) para 37.

a core obligation of State Parties to obtain FPIC when the preservation of their cultural resources is at risk.[276]

Articulating the specific legal obligations imposed upon State Parties in relation to the right to culture, the CESCR explains that there are three levels of obligations—the obligations to respect, to protect and to fulfil.[277] In light of the third level of obligation—to fulfil cultural human rights—the CESCR highlights repeatedly in its Concluding Observations that State Parties bear a duty to adopt legislation pertinent to consultation and FPIC in order to facilitate the participation of Indigenous peoples.[278] It elaborates that FPIC should be systematically sought with effective consultation,[279] based on intercultural dialogues[280] that reflect the cultural difference of each people.[281] It also stresses that effective FPIC mechanisms should aim to enable *meaningful* participation of Indigenous peoples in decision-making processes in relation to development projects on or near their lands or territories.[282] The CESCR thus has taken a rather proactive approach in affirming State Parties' obligations regarding FPIC especially when Indigenous peoples and minority groups are included.

---

[276] ibid para 55 (e).

[277] ibid para 48.

[278] See CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights of Colombia' (7 June 2010) UN Doc E/C.12/COL/CO/5 para 9, CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights of Argentina' (14 December 2011) UN Doc E/C.12/ARG/CO/3 para 9 and CESCR, 'Concluding Observations on the Fourth Periodic Report of Chile' (7 July 2015) UN Doc E/C.12/CHL/CO/4 para 8(b).

[279] CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights of Peru' (30 May 2012) UN Doc E/C.12/PER/CO/2-4 para 23.

[280] CESCR, 'Concluding Observations of the Committee on the Third Periodic Report of Ecuador as Approved by the Committee at its Forty-ninth Session (14–30 November 2012)' (13 December 2012) UN Doc E/C.12/ECU/CO/3 para 9.

[281] CESCR, 'Concluding Observations on the Sixth Periodic Report of Colombia' (19 October 2017) UN Doc E/C.12/COL/CO/6 para 18(b).

[282] CESCR, 'Concluding Observations on the Sixth Periodic Report of Canada' (23 March 2016) UN Doc E/C.12/CAN/CO/6 para 14. Emphasis added.

Furthermore, recognising the "communal dimension" of Indigenous peoples' cultural life that is indispensable to their existence, well-being and full development, as well as the inextricable relationship between Indigenous cultural rights and their rights to lands and resources, the CESCR has demanded State Parties to recognise and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without FPIC, take steps to return these lands and territories.[283] In other words, the absence of FPIC is capable of triggering State's responsibility to take measures to ensure redress and restitution, even though the FPIC might not be required at the time when the lands were used. Thus, under the normative framework of ICESCR, the principle of FPIC does not only invoke a positive duty of State to secure FPIC, but can also, arguably, function as retroactive means to justify remedial claims and vindicate the past violations of Indigenous rights.[284] However, in reality, it is difficult to observe whether and/or to what extent the standards articulated by the CESCR are fully respected and implemented at national and local levels.

3.2.3.3 Committee on the Elimination of Racial Discrimination

The CERD monitors the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[285] State Parties have been particularly called upon to ensure effective participation of Indigenous peoples in public life and that "no decisions directly relating to their rights and interests are taken without their informed consent".[286] In its Concluding Observations, the CERD has elaborated on the States' duty to conduct consultation with Indigenous peoples in

[283] CESCR, *CESCR General Comment No. 21* (n 271) para 36.

[284] This remedial function of FPIC is also discussed in the previous section on the international human rights instruments.

[285] ICERD.

[286] CERD, *CERD General Recommendation No. 23* (n 215) para 4(d) and CERD, 'Report of the Committee on the Elimination of Racial Discrimination' (2002) UN Doc A/57/18 paras 76 and 304.

situations where their interests and rights are relevant, for instance, resource exploration programmes that are conducted on Indigenous land,[287] and developing and implementing domestic legislation[288] and policy[289] that concern Indigenous peoples. It has also stressed the importance of securing Indigenous peoples' agreement in order to ensure their participation[290] and in one case required a State to seek FPIC as well as ensure equitable benefit-sharing.[291] Notably, in line with the CESCR, the CERD calls upon State to take steps to return Indigenous lands, if they have been inhabited or used without Indigenous peoples' FPIC.[292]

MacKay and Gilbert have demonstrated that the emphasis of CERD on Indigenous peoples' right to informed consent and consultation has informed the drafting process of the UNDRIP and is reflected in Article 32(2) of the UNDRIP.[293] The explicit language of "FPIC" as a procedural requirement for safeguarding Indigenous peoples' human rights is enunciated in the practice of the CERD especially

---

[287] CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Colombia' (12 April 2001) UN Doc CERD/C/304/Add.76 para 16.

[288] CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Canada' (25 May 2007) UN Doc CERD/C/CAN/CO/18 para 25.

[289] For land tenure and education policies see CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Argentina' (10 December 2004) UN Doc CERD/C/65/CO/1 paras 16 and 19. Regarding constitutional reform in Mexico, see CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Mexico' (4 April 2006) UN Doc CERD/C/MEX/CO/15 para 13.

[290] CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Argentina' (27 April 2001) UN Doc CERD/C/304/Add.112 para 10. Emphasis added.

[291] CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Ecuador' (2 June 2003) UN Doc CERD/C/62/CO/2 para 16.

[292] CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Bolivia' (10 December 2003) UN Doc CERD/C/63/CO/2 para 13.

[293] Jérémie Gilbert, 'CERD's Contribution to the Development of the Rights of Indigenous Peoples under International Law' in David Keane and Annapurna Waughray (eds), *Fifty Years of the International Convention on the Elimination of All Forms of Racial Discrimination: A Living Instrument* (Manchester University Press 2017) 91 and Fergus MacKay, 'Indigenous Peoples' Rights and the Committee on the Elimination of Racial Discrimination' in Solomon A. Dersso (ed), *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (Pretoria University Law Press 2010) 199.

after the adoption of the UNDRIP. Specifically, the CERD occasionally adopts affirmative language when addressing State's duty to obtain FPIC and urges State Parties to "consult the Indigenous population concerned at each stage of the process and obtain their consent in advance of the implementation of projects for the extraction of natural resources".[294] The CERD also explains that the purpose of an effective consultation mechanism is for obtaining Indigenous FPIC[295] and elaborates that such mechanism should be "carried out systematically and in good faith".[296] The correlated duty for State Parties sometimes appear "mild" as they are required to establish appropriate regulations and mechanisms to ensure that prior consultations are conducted "with a view to securing" FPIC,[297] while sometimes more affirmative as they are required to obtain "meaningful" FPIC of Indigenous peoples.[298] This oscillation manifests the fact that although FPIC unquestionably constitutes a human right of Indigenous peoples, the extent to which it shall be secured has not yet been established clearly by the CERD. Nevertheless, minimum standards for States to seek FPIC from Indigenous peoples are in place. Overall, CERD's contribution to

[294] See CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Ecuador' (22 September 2008) UN Doc CERD/C/ECU/CO/19 para 16 and CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Peru' (3 September 2009) UN Doc CERD/C/PER/CO/14-17 para 14.

[295] CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Argentina' (29 March 2010) UN Doc CERD/C/ARG/CO/19-20 para 26.

[296] See CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Bolivia' (8 April 2011) UN Doc CERD/C/BOL/CO/17-20 para 20 and CERD, 'Concluding Observations on the Combined Nineteenth to Twenty-first Periodic Reports of Chile' (23 September 2013) UN Doc CERD/C/CHL/CO/19-21 para 13 (c).

[297] CERD, 'Concluding Observations on the Combined Twenty-first to Twenty-third Periodic Reports of Argentina' (11 January 2017) UN Doc CERD/C/ARG/CO/21-23 para 19.

[298] CERD, 'Concluding Observations on the Combined Twenty-first to Twenty-third Periodic Reports of Canada' (13 September 2017) UN Doc CERD/C/CAN/CO/21-23 para 20 (c).

articulating the human rights standards with respect to Indigenous peoples is widely recognised by international scholars.[299]

3.2.3.4 Regional human rights courts and commissions

In this section, I visit the decisions of four regional human rights judicial bodies with respect to IPLCs' right to FPIC. These are the Inter-American Commission on Human Rights (Inter-American Commission), the Inter-American Court on Human Right (Inter-American Court), the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court). What is common in these decisions is that FPIC has been reckoned as an important means to ensuring effective participation of IPLCs in decision-making process that might affect them. The right to FPIC is generally linked with other fundamental human rights pertaining to lands, freely disposing of natural resources, culture and development. In two landmark cases, the 2007 *Saramaka* case and the 2010 *Endorios* case, it can also be observed that FPIC is considered as an extra procedural safeguard in addition to consultation, applicable in large-scale projects that might profoundly influence IPLCs.[300] Nevertheless, the ways to identify condition in which FPIC is required in addition to consultation are not clear.

Back in 1998, the Inter-American Commission approved the Merits Report No. 27/98, in which it concluded that the State of Nicaragua had been actively responsible for violations of the right to property by granting concession to the construction work and logging exploitation on the Awas Tingni lands without their consent.[301] The

[299] MacKay, 'Indigenous Peoples' Rights and the Committee on the Elimination of Racial Discrimination' (n 293) 155 and David Keane and Annapurna Waughray, *Fifty Years of the International Convention on the Elimination of All Forms of Racial Discrimination: A Living Instrument* (Manchester University Press 2017) 2.

[300] *Case of the Saramaka People v Suriname* (n 241) para 137 and *Endorois Case* (n 242) para 291.

[301] Inter-American Commission on Human Rights, 'Merits Report No. 27/98' (1998) OEA/Ser/L/V/II.98 Doc. 35 para 142.

Commission then brought the case before the Inter-American Court—the well-known ruling of the Inter-American Court on the *Awas Tingni* case.[302] In this case, the Inter-American Court held that the alleged property land rights had indeed been violated but it did not address the issue of FPIC.[303] In the 2006 *Case of the Sawhoyamaxa Indigenous Community v Paraguay*, the Inter-American Court found that Paraguay had violated the property rights of the Sawhoyamaxa community by depriving their possession of land and their ability to participate in their culture, and by failing to provide effective remedies to allow them to regain access to these lands.[304] As the Court specified the forms and measures of reparation, it held that "the State shall secure *participation and informed consent* by the victims, which must be expressed by their representatives and leaders".[305] One year later, the Inter-American Court established in the landmark *Case of the Saramaka People v Suriname* three procedural safeguards that the State must abide in order to fulfil their obligation to ensure the right to property of Indigenous peoples, including effective participation, prior environmental and social impact assessments and benefit-sharing.[306] The case concerns the issuance of logging and mining concessions by the Suriname Government toward resources found within Saramaka territory. Recognising Saramaka's right to property and self-determination, the Court has cited explicitly the ILO Convention 169, the UNDRIP, as well as the jurisprudence of the UN human rights treaty bodies.[307] With respect to the Indigenous right to consultation and the situation where it may contain "a duty to obtain consent", the Court articulated that the States always have a duty "to actively consult with the community according to their customs and

[302] *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* [31 August 2001] (Inter-American Court of Human Rights) IACHR Series C no 79.

[303] ibid, para 153.

[304] *Case of the Sawhoyamaxa Indigenous Community v Paraguay* [29 March 2006] (Inter-American Court of Human Rights) IACHR Series C No 146 paras 116-144.

[305] ibid para 233. Emphasis added.

[306] *Case of the Saramaka People v Suriname* (n 241) para 129.

[307] ibid paras 45-98 and 129-137.

traditions".[308] When the concerned development or investment projects are large-scaled and would have a *major impact* within Saramaka territory, States also have a duty, to *obtain* their FPIC.[309] In this light, in the 2015 *Case of Kaliña and Lokono Peoples v Suriname*, the Court found that the State had failed to ensure the effective participation of the Kaliña and Lokono peoples before undertaking or authorizing the exploitation of the bauxite mine within their traditional territory.[310] One important reasoning that lead to this decision is the lack of any consultation processes aimed at obtaining the FPIC of the Kaliña and Lokono peoples.[311]

In the African context, the African Commission established in the *Endorois* case that "failure to observe the obligations to consult and to seek consent…ultimately results in a violation of the right to property".[312] This case concerns the displacement of the Indigenous Endorois community from their ancestral lands in Kenya.[313] The African Commission cited the ruling of the *Saramaka* case and decided that the absence of the procedural elements—impact assessment, FPIC and benefit-sharing is tantamount to a violation of the right to property and that "the failure to guarantee effective participation…also extends to a violation of the right to development".[314] In line with the Saramaka decision, the African Commission held that "any development or investment projects that would have a *major impact* within the Endorois territory, the State has a duty not only to consult with the community, but also to *obtain* their free, prior, and informed consent, according to their customs and traditions".[315] Based

[308] ibid paras 129 and 133.

[309] The Court, however, reckoned that "the difference between "consultation" and "consent" in this context requires further analysis." See ibid para 134. Emphasis added.

[310] *Case of Kaliña and Lokono Peoples v Suriname* [25 November 2015] (Inter-American Court of Human Rights) IACHR Series C no 309 para 212.

[311] ibid paras 1 and 204-212

[312] *Endorois Case* (n 242) para 226.

[313] ibid para 1.

[314] ibid paras 227 and 228. The procedural element "benefit-sharing" is articulated in chapter three section 2.3.

[315] ibid para 291.

on this observation, the African Commission established that the consultation conducted by the Kenyan Government was not sufficient because it did not obtain the FPIC of all the Endorois before designating their land as a Game Reserve and the consequential eviction.[316] Another relevant case is the 2017 *Ogiek* case,[317] which concerns the eviction of the Indigenous Ogiek community and other settlers of the Mau Forest by the Kenya Forestry Service in October 2009. In this case, although the Applicant has alleged consistently that, due to the absence of a FPIC from the Ogiek community, the Kenyan Government has violated the Ogieks people' rights to freely dispose of their wealth and natural resources,[318] to property,[319] and to development,[320] the Court did not fully adopt the language of FPIC in its decision. Nevertheless, the Court found that these mentioned rights in relation to the property right to land were indeed violated "by expelling the Ogieks from their ancestral lands against their will, without *prior consultation*…the Respondent violated their rights to land". [321] The African Court in this case also has cited the UNDRIP and suggested that the Indigenous right to lands shall be read in light of the UNDRIP.[322]

3.2.4 Human rights implications

The above analysis indicates that FPIC, as an emerging human rights principle, is designated to ensure effective and meaningful participation of Indigenous peoples, minority groups and local communities in decision-making processes in matters that might affect their rights. Under the jurisprudence of the CESCR, the CERD and in the

---

316 ibid para 290.

317 *African Commission on Human and Peoples' Rights v Republic of Kenya* [26 May 2017] (African Court on Human and Peoples' Rights) App No 006/2012.

318 ibid para 191.

319 ibid para 114.

320 ibid para 202.

321 ibid para 131.

322 ibid para 128.

context of the UNDRIP, the absence of FPIC could also impose obligations on States to provide redress and fair compensation for the past violation of Indigenous peoples' lands, resources, cultural and intellectual properties. The duty of State to conduct consultation, adopt legislation on FPIC and to seek FPIC has been enunciated, but the extent to which FPIC must be secured is not always clear. In particular, it remains unsettled whether the human right of FPIC could include a veto power on the concern projects or not. While the absent of a veto power in the current elaboration of FPIC in international human rights law is conspicuous, the benefits of doing so in fostering a stronger relationship between Indigenous peoples and their residual States have also been discussed, [323] Overall, the trend of establishing the connection between participatory rights such as consultation and FPIC with substantive rights such as the rights to property, development, culture and self-determination has been identified.[324] This is especially conspicuous after the adoption of the UNDRIP, which explicitly anchors Indigenous peoples' rights to participation in their right to self-determination. The connection between substantive and procedural human rights is important as the right of self-determination, as provided in the Charter of the United Nations and two international Covenants on human rights, includes both economic and cultural dimensions. For many IPLCs, this means control over their lands and natural resources depends on which they maintain their traditional way of life and cultural practices.[325] As often the power of deciding on exploitation activities vests with State governments,

[323] Human Rights Council, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Rights to Development' (15 July 2009) UN Doc A/HRC/12/34 para 49, Doyle (n 208) 161.

[324] Discussion about the integration of the principle of FPIC with other environment principle is also emerging, for instance, see Malayna Raftopoulos and Damien Short, 'Implementing Free Prior and Informed Consent: the United Nations Declaration on the Rights of Indigenous Peoples (2007), the Challenges of REDD+ and the Case for the Precautionary Principle' (2019) 23 (1-2) The International Journal of Human Rights 97.

[325] For more examples see Juan Mart'inez-Alier, *The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation* (Edward Elgar 2002) 100.

it is essential for these peoples and communities to participate in the decision-making processes of projects that might affect them.

Could ABS and human rights be complementary to each other's interpretation and implementation with respect to IPLCs' right to PIC/FPIC? There are two perspectives to approach the possibility and necessity of a mutually supportive interpretation. First, the human rights standards on FPIC may provide normative ground for clarifying the interpretation of the ABS provisions, recalling the interpretative ambiguity of PIC-related provisions in the Nagoya Protocol as discussed in section 2.2.[326] Specifically, the human rights standards on IPLCs' right to FPIC would suggest that the narrow reading of Article 6 of the Nagoya Protocol, which implies that Parties do not have to ensure ILCs' PIC unless ILCs' right to grant access to GR is explicitly established, is unsound.[327] This is because, even though there is no explicit assertion of a "right" of IPLCs to grant access, there are correlated duties imposed upon States to ensure FPIC and foreseen legal consequences if the FPIC is absent in certain circumstances. In other words, States' duty to ensure FPIC exists as a human rights requirement regardless of whether IPLCs' right to "grant access" has been explicitly established by domestic laws or not. Furthermore, the connection between IPLCs' right to FPIC and other fundamental human rights implies their entitlement to grant access is not just an extrinsic normative creation by States, but an intrinsic right derived from the identity of such peoples and communities. This means IPLCs' right to grant access regarding their GR and TK is established by the minimum standards of human rights and has intrinsically taken root in their fundamental human rights of property, culture and self-determination. This also means that States Parties' discretion to interpret and implement the ABS provisions in the Nagoya Protocol need

[326] The approach has been suggested by Morgera, Tsioumani and Buck (n 6) 147 and Savaresi (n 6) 60, but I have further developed the conclusion.

[327] See the discussion in the previous section 2.2.1.

to be in accordance with their human rights obligations, in particular, to recognise, establish and protect IPLCs' rights to FPIC. Admittedly, the ground for Indigenous peoples to make human rights-based claims of FPIC is much stronger than that for local communities. It might be easier for Indigenous peoples to request a more robust protection of the right of FPIC in a domestic context.

In turn, the ongoing process of interpreting and implementing the Nagoya Protocol could contribute to the understanding of human rights standards with respect to IPLCs. As examined, the international ABS framework provides a specific context where the principles and measures of a PIC/FPIC system are elaborated, domestic consultative initiatives, procedural requirements and facilitative responsibilities of State governments articulated, innovative solutions and good practices encouraged and increasingly established.[328] These legal advances and institutional developments provide timely normative guidance and practical evidence on how to transpose the abstract yet fundamental human right standards, that FPIC should be, *inter alia*, effective, meaningful and culturally appropriate, into a feasible agenda for State governments and private entities. The impacts might be limited as the ABS rules of the Nagoya Protocol only concern GR and associated TK, but the lessons can be learnt for other areas as well. Furthermore, as the traditional FPIC mechanisms focus on the coercion and infringement of Sate vis-à-vis IPLCs, PIC mechanism in the Nagoya Protocol could help to address the emerging concern of violations to IPLCs' rights carried out by private entities. This is especially the case with multinational corporations that are involved in bioprospecting and utilising GR and TK accessed from IPLCs around the globe.[329] Finally, in situations where States retain ownership

[328] See previous discussion in section 2.2.

[329] For a glimpse of how multinational corporation control marine GR, see Robert Blasiak and others, 'Corporate Control and Global Governance of Marine Genetic Resources' (2018) 4 (6) Science Advances, 1.

of GR and TK, or IPLCs' human rights to GR and TK are not recognised,[330] the ABS rules of the Nagoya Protocol could ensure their status as beneficiaries, if not owners of GR and TK. It could enable IPLCs to participate in and benefit from the economic development and technological advancements vis-à-vis GR and TK. These implications contribute especially to the process of articulating legal standards of including the often-neglected local communities in the decision-making processes that might affect their rights.

However, normative uncertainties persist. For instance, the extent to which the States bear responsibility to secure that the consent is obtained from IPLCs, or whether Indigenous peoples' right to FPIC implies a veto power of the project concened. Underlying these uncertainties is the political reluctance of relating IPLCs' participatory rights such as consultation and FPIC to more substantive human rights to property and self-determination. This disjuncture between participatory rights and substantive rights is also evident in the CBD and the Nagoya Protocol, as these environmental law instruments only incorporate the procedural elements such as FPIC, but abstain from referring to IPLCs' human rights explicitly. This might be explained from a rather State-centric perspective, suggested by Bluemel, that the practical pursuit of a functional, effective and workable ABS framework determines the level of discretion accorded to State governments on matters relating to IPLCs and their rights.[331] However, the protection of IPLCs' human rights should not be restricted by States' political agendas. It is in this regard, a mutually supportive understanding of the Nagoya Protocol in light of international human rights law may level the normative

[330] Gurdial Singh Nijar, 'Incorporating Traditional Knowledge in an International Regime on Access to Genetic Resources and Benefit Sharing: Problems and Prospects' (2010) 21 (2) European Journal Of International Law, 465.

[331] Erik B. Bluemel, 'Separating Instrumental from Intrinsic Rights: Toward an Understanding of Indigenous Participation in International Rule-Making' (2005) 30 (1) American Indian Law Review, 132.

ground of ABS towards better accommodating IPLCs' needs and aspirations instead of States governments' conveniences and priorities.

3.3 Human rights pertaining to ILCs' customary laws

This section looks at human rights standards in recognising and protecting customary laws of IPLCs in relation to the previous analysis in section 2.3 about how ILCs' customary laws and community protocols are addressed under the Nagoya Protocol. There is no consensus on the terminology to describe laws and customs developed by ILCs in international human rights law.[332] A variety of terms, including, customs, traditions, institutions, laws, values and customary laws, has been adopted in the contexts of the ILO and the UNDRIP.[333] Scholars including Coombe, Williams and Hardison have observed that this concept is closely related to TK that are developed by IPLCs.[334] The following analysis provides a closer examination of the ILO Convention 169 and the UNDRIP, as well as the judicial and legislative practices at regional and national levels pertaining to the recognition of IPLCs' rights relating to their customary laws. It concludes with remarks on how the ABS procedures and normative recognition of ILCs' customary laws and community protocols may contribute to their realisation, as well as how human rights pertaining to customary law may help to set the benchmark on how and to what extent the ILCs' customary rules shall be respected.

---

[332] Tobin, *Indigenous Peoples, Customary Law and Human Rights - Why Living Law Matters* (n 156) 9.

[333] See the Preambles and the operational provisions of these two instruments.

[334] Rosemary J. Coombe, 'The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law' (2001) 14 (2) St Thomas Law Review, 284 and Terry Williams and Preston Hardison, 'Culture, Law, Risk and Governance: Contexts of Traditional Knowledge in Climate Change Adaptation' in Julie Koppel Maldonado, Benedict Colombi and Rajul Pandya (eds), *Climate Change and Indigenous Peoples in the United States: Impacts, Experiences and Actions* (Springer International Publishing 2014) 534.

The only binding international instrument that addresses Indigenous peoples' human right to customary law is the ILO Convention 169. Noting that the "laws, values, customs and perspectives" of Indigenous and tribal peoples have often been eroded,[335] the Convention 169 obliges its Parties to respect Indigenous and tribal peoples' customs, traditions and institutions while "promoting the full realisation of the social, economic and cultural rights of these peoples", as a means to guarantee respect for their integrity.[336] Specifically, Article 8 requires Parties, in applying national laws and regulations to the peoples concerned, to pay due regard to their customs or customary laws.[337] The extent to which Indigenous peoples are entitled to retain their own customs and institutions, however, is conditioned by the requirements that they are "not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights".[338] The apparent limitation of the normative power of these provisions under the Convention 169 is that only 23 States have ratified it since its entry into force in 1991.[339]

The customary laws of Indigenous peoples are recognised explicitly in various connections under the UNDRIP. For instance, custom and traditions were established as a baseline for Indigenous peoples' right to self-identification.[340] They shall also be given due consideration when Indigenous peoples exercise their right of access to justice.[341] In addition, the right to practise and revitalise Indigenous cultural traditions and customs imposes an obligation for States to provide redress when Indigenous

[335] ILO Convention 169, pmbl.

[336] ibid art 2.

[337] ibid art 8(1)..

[338] ibid art 8(2).

[339] The ILO Convention 169 only has 23 Parties now, see ILO, 'Ratifications of C169' (1991) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314> accessed 08/04/2019.

[340] UNDRIP, arts 9 and 33.

[341] ibid art 40.

peoples' cultural and intellectual property are taken "in violation of their laws, traditions and customs".[342] Most importantly, Article 27 requires States to "recognize and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources", while giving due recognition to "Indigenous peoples' laws, traditions, customs and land tenure systems".[343] Article 34 recognises the right of Indigenous peoples to "promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards".[344]

In judicial practice, the Inter-American Court has issued decisions that demand respect for Indigenous culture and local customs.[345] In the *Aloeboetoe v Suriname* case, as there are different opinions between Parties about who the successors of the victims (which are members of the Saramaka tribe) are, the Court decided to apply the Saramaka customs, instead of Suriname's civil law.[346] As a result, the Court accepted two spouses as successors in cases in which the victim had two wives since polygamy was accepted in Saramaka customary law.[347] However, as the Court reckoned that the gender distinction in customary law of recognising only male ascendants contradicts the American Convention on Human Rights, it has determined that both male and female ascendants shall be recognised as successor, even if that might be contrary to the Saramaka custom.[348] This decision, although adopted before the UNDRIP, is in

[342] ibid art 11.

[343] ibid art 27.

[344] ibid art 34.

[345] Cases cited in Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (n 197) 162.

[346] *Aloeboetoe v Suriname* [10 September 1993] (Inter-American Court of Human Rights) IACHR Series C no 15 paras 55 and 62.

[347] ibid para 59.

[348] ibid para 62.

line with the requirement of the ILO Convention 169 and the UNDRIP. It is especially so in the sense that while the Court upholds the Saramaka custom of polygamy, it prioritises the fundamental human rights principle of gender equality and non-discrimination, by which it denies the validity of the gender distinction of male and female successors. This approach is important because, as Tobin has argued, the recognition of Indigenous peoples' rights to their own legal regimes, customs and institutions could safeguard the realisation of their human rights.[349] Furthermore, in situations where the customary rules of IPLCs are incompatible with fundamental human rights, human rights standards could protect especially the vulnerable members of the communities against unfair treatments that might otherwise be justified by customary laws.[350]

At the national level, Indigenous peoples, minority groups, local communities, and their rights to autonomy, customary legal systems, traditional authorities, customary lands, resources, and/or cultures are recognised to varying degrees in many national constitutions or judicial and administrative practices.[351] In India, for example, measures to prevent interference with the land rights and customary laws of "scheduled tribes" (a term favoured by Indian government to refer to their IPLCs) are given constitutional protection.[352] In China, 55 officially recognised ethnic minorities enjoy a distinct set of rights and freedoms established by the Constitution and the national law on regional autonomy, which includes the collective rights to territorial autonomy, to manage their own cultural affairs and to have national laws and regulations adjusted

[349] Tobin, *Indigenous Peoples, Customary Law and Human Rights - Why Living Law Matters* (n 156) 1.

[350] See in general, Muna Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) 18 (1) Indiana journal of global legal studies, 89 and Lindsay Short, 'Tradition versus Power: When Indigenous Customs and State Laws Conflict' (2014) 15 (1) Chicago Journal of International Law, 403.

[351] See generally Katrina Cuskelly, *Customs and Constitutions: State Recognition of Customary Law around the World* (IUCN 2011).

[352] Raja Devasish Roy, *Traditional Customary Laws and Indigenous Peoples in Asia* (Minority Rights Group International 2005) 7.

in accordance to their local customary rules.[353] Indeed, autonomous governance often plays an imperative role for IPLCs in gaining control over the development of their distinctive cultures, management and utilisation of land and resources in their traditional ways against undue interference by powerful economic interests or State governments.[354] However, the actual impact of this legal recognition in specific political and economic contexts needs to be evaluated on a case-by-case basis.[355]

It can be observed that international human rights standards require respect for the customary laws of IPLCs although what exactly these laws might be have not been defined. There is a certain level of judicial and legislative preparedness and willingness to recognise IPLCs' customary laws, given that it is compatible with other fundamental human rights. So, how could the Nagoya Protocol contribute to safeguarding IPLCs' human rights pertaining to their customary laws in light of the principle of mutual supportiveness? In the context of accessing IPLCs' GR and TK for commercial or scientific utilisation, the Nagoya Protocol recognises IPLCs' customary laws and community protocols and impose obligations for users to obtain PIC and/or ensure approval and involvement of IPLCs in the ABS processes taking into account such laws and protocols. The explicit recognition of IPLCs' customary rules, thus, has the ability to integrate the customary norms of IPLCs into national and international ABS transactions and practices. As a result, respecting the customary laws of IPLCs could

[353] Constitution of the People's Republic of China [2018] (CH), art 4 and Law of the People's Republic of China on Regional National Autonomy [2001] (CH), ch 3. See also Xiaoou Zheng, 'Key Legal Challenges and Opportunities in the Implementation of the Nagoya Protocol: The Case of China' (2019) 28 (2) Review of European, Comparative and International Environmental Law, 177.

[354] Pereira and Gough (n 190) 158.

[355] For scholarly discussion on the interplay between principle and effectiveness, law and policy in both environmental and human rights contexts, see Louka (n 58) 59, Ronagh J. A. McQuigg, *International Human Rights Law and Domestic Violence: The Effectiveness of International Human Rights Law* (Routledge 2011) 1. For a quantitative analysis of the effectiveness of human rights treaties and its critics, see Oona A. Hathaway, 'Do Human Rights Treaties Make A Difference?' (2002) 111 (8) Yale Law Journal, 2020 and Ryan Goodman and Derek Jinks, 'Measuring the Effects of Human Rights Treaties' (2003) 14 (1) European Journal Of International Law, 172.

facilitate adequate and culturally appropriate realisation of fair and equitable benefit-sharing with IPLCs. The values, worldviews and traditional approaches of IPLCs reflecting their needs and aspirations could then be communicated through each and every ABS negotiation from local and Indigenous contexts to broader domestic and international contexts. In practice, it is often the domestic legislation, especially contract laws, that oversees the negotiation and compliance with ABS measures such as MAT. In this connection, it is also possible to rely on private law and its compliance mechanism to safeguard IPLCs' rights pertaining to their customary laws, especially when MAT contains explicit reference to IPLCs' customary rules.[356]

Furthermore, recognising IPLCs' customary laws and ensuring compliance with their customary rules may prove essential in demonstrating compliance with human rights obligations.[357] For example, the identification of the legitimate representatives of IPLCs to issue PIC and the establishment of culturally appropriate procedures to include ILCs in the decision-making processes and the negotiation of benefit-sharing terms. In this connection, the recognition of IPLCs' customary laws may provide an opportunity to bridge State Parties' obligations to the Nagoya Protocol and their commitments to human rights standards in a systematic manner. Safeguarding the customary laws of IPLCs' may also provide legal certainty throughout the ABS processes and to raise awareness of the legal status of IPLCs' customary law in the broader context of international law. Ideally, this process may facilitate the establishment of sound national and international legal practices and governance of GR and TK held by IPLCs. As suggested by the CBD Working Group on ABS, recognising IPLCs' rights to GR and TK is perhaps the most effective way to

[356] ABS, *Study on Compliance in Relation to the Customary Law of Indigenous and Local Communities, National Law, Across Jurisdictions, and International Law* (n 154) para 9.

[357] Tobin, *Indigenous Peoples, Customary Law and Human Rights - Why Living Law Matters* (n 156) 5.

ensure respect also for customary laws in the context of ABS and beyond.[358] Nevertheless, the extent to which this mutually supportive interpretation of the ABS law and human rights law pertaining to IPLCs' customary law could be realised depends largely on States governments' political willingness and capability to comply. Finally, in terms of how human rights standards may contribute to the interpretation and implementation of the Nagoya Protocol, I argue that human rights may help to set the benchmark in particular for the vulnerable members of IPLCs as to ensuring their rights to PIC and fair and equitable benefit-sharing. In other words, the human rights requirements that the customary law shall not be incompatible with fundamental human rights could be used to guide the implementation of the Nagoya Protocol and to prevent unfair terms and treatments within IPLCs. This is important especially when traditional practices of IPLCs contradict the principles such as gender equality and non-discrimination.[359]

4. Conclusion

The principle of State sovereignty underpins access-related provisions in the CBD and the Nagoya Protocol. This means that States have the authority to determine how their GR may be accessed and under what procedural requirements. However, as discussed, States' sovereign rights are neither unconditional nor absolute. In the ABS context, the Nagoya Protocol imposes obligations on State Parties to ensure that GR and TK held by IPLCs are accessed and obtained with their PIC and that IPLCs' customary laws and community protocols are taken into consideration. The intra-State obligations of State Parties owed towards IPLCs in order to ensure fair and equitable benefit-sharing entail many procedural requirements, such as consultation, PIC, impact assessments

[358] ABS, *Study on Compliance in Relation to the Customary Law of Indigenous and Local Communities, National Law, Across Jurisdictions, and International Law* (n 154) 4.

[359] The human right to equality and non-discrimination is discussed further in section 2.1 of chapter three.

and capacity-building, as enshrined in the normative standard-setting process under the CBD. In the human rights context, States' obligation to respect, protect and fulfil IPLCs' rights of self-determination, property, development and culture are also complemented by procedural requirements such as consultation and FPIC. In this chapter, the IPLCs' rights of self-determination and to FPIC have been examined in order to convey the implications of international human rights.

Specifically, I argued that Indigenous peoples' right of self-determination takes shape as a human right obligation for States to exercise their sovereign rights for the purpose of promoting national development and ensuring the well-being of all peoples. With respect to the emerging human rights principle FPIC, I identified its versatile functions—of not only ensuring effective and meaningful participation of IPLCs in decision-making processes, but also as a retroactive means for IPLCs to claim redress and fair compensation for the past violation. I visited the relevant provisions in the ILO Convention 169 and the UNDRIP, the jurisprudence of three UN human rights treaties bodies (the HRC, the CESCR and the CERD) and regional human rights courts and tribunals. The observation is that the duty of States to conduct consultation, adopt legislation on FPIC and to seek FPIC has been articulated, but the extent to which FPIC must be secured is not always clear. To study the evolution of international human rights law pertaining to FPIC in the past two decades, a trend of connecting IPLCs' participatory rights such as consultation and FPIC with substantive rights such as the rights to property, development, culture and self-determination is present. This connection is increasingly established by the judicial practices of international and regional human rights bodies especially after the adoption of the UNDRIP in 2007.

In light of the principle of mutual supportiveness, I argued that the human rights standards on FPIC would invalidate the narrow reading of Article 6 of the Nagoya Protocol. Specifically, ILCs' rights to grant access shall not be solely subject

to domestic recognition but indeed is required by the minimum standards of international human rights. Based on the intrinsic link between IPLCs' right to FPIC and other fundamental human rights, I suggested that their entitlement to grant FPIC is not just an extrinsic normative creation by States, but an intrinsic right derived from the identity of such peoples and communities. Accordingly, States' duty to ensure FPIC is imposed by human rights principles regardless of whether IPLCs' right to "grant access" has been explicitly established in the domestic context or not. In other words, States Parties' discretion to interpret and implement the Nagoya Protocol needs to be understood and exercised in accordance with their human rights obligations, especially to recognise, establish and protect IPLCs' rights to FPIC. In turn, the ongoing process of interpreting and implementing the Nagoya Protocol could contribute to understanding the human rights norms by providing specific contexts, timely normative guidance and practical evidence on how to transpose human right standards into feasible agendas of States governments and private entities with respect to utilising GR and TK and fair and equitable benefit-sharing. Opportunity of a mutually supportive interpretation also exists as to expand the focus of traditional FPIC mechanisms from coercion and infringement of States vis-à-vis IPLCs, to the emerging tension between IPLCs and powerful multinational corporations. Further research is needed to fully unpack the role and responsibility of multinational corporations.[360] Political uncertainties also persist. For instance, it depends on State governments to decide to what extent they are willing to balance their human rights commitments against the pragmatic pursuit of a workable ABS framework in their domestic

[360] I discuss this point as a potential avenue for future work in section 2 of chapter five. For scholarly discussion on especially human rights obligations of multinational corporations as non-State actors, see Peter T. Muchlinski, 'Human Rights and Multinationals: Is there a Problem?' (2001) 77 (1) International Affairs, 31, Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 195, John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 (4) American journal of international law, 819 and essays in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 1.

legislation and policies. A mutually supportive interpretation of the Nagoya Protocol and the human rights law cannot address all above uncertainties. However, as demonstrated, it can shed light on the ways in which States' responsibilities of protecting IPLCs' human rights could be integrated into the Nagoya Protocol and the scholarly discussion of why this is necessary. Furthermore, such an approach could provide guidance on how to interpret and implement the Nagoya Protocol in a way that can better accommodating IPLCs' needs and aspirations instead of States governments' conveniences and priorities.

Finally, based on the novel recognition of IPLCs' customary laws, community protocols and procedures in the Nagoya Protocol, I investigated the human rights recognition of the customary norms of IPLCs. Although remain the term remains undefined, the importance of the customary laws is recognised in the ILO Convention 169 and the UNDRIP as well as some jurisprudential interpretations. I suggested that such recognition could facilitate adequate and culturally appropriate realisation of IPLCs' right vis-à-vis their GR and TK and communicate their traditional approaches and worldviews to a broader national and international context. In light of a mutually supportive interpretation, I argued that the ABS rules of the Nagoya Protocol may help to realise the customary rules of IPLCs in specific benefit-sharing agreements, which are protected by domestic laws such as private contract law. Meanwhile, to recognise IPLCs' customary laws and ensure compliance with such rules may prove essential in demonstrating compliance with their human rights obligations for State Parties. Last but not least, I demonstrated the potential of using human rights principles to oversee equal and fair treatment within IPLCs, in particular for those who are vulnerable to discriminatory or unfair customary rules. Many of these observations are not stand-alone in the context of access to GR and TK, but also resonate with respect to fair and equitable benefit-sharing, which will be discussed in the next chapter.

Chapter Three

Benefit-sharing and human rights implications for benefit-sharing related provisions of the Nagoya Protocol

The fair and equitable sharing of the benefits arising out of the utilisation of genetic resources (GR) is at the core of the Convention on Biological Diversity (CBD) and its Nagoya Protocol, regarded as one of the three pillars of the access and benefit-sharing (ABS) framework.[1] This chapter investigates the provisions in the Nagoya Protocol with respect to benefit-sharing and examines the applications of relevant international human rights. Often cited as the "grand bargain",[2] benefit-sharing is established by the CBD in 1992 in order to provide biodiversity-rich countries and communities with the incentives and financial support for biodiversity conservation and sustainable use of its components.[3] It is also the logical consequence of the recognition of the rights of the provider countries and the Indigenous and local communities (ILCs). According to the CBD and the Nagoya Protocol, benefit-sharing should be "fair and equitable", a standard underlined by the principle of equity that demands benefits to be fairly distributed among those who have created, managed and developed the concerned GR and associated traditional knowledge (TK).[4]

Built upon the CBD, the Nagoya Protocol elaborates the rights and obligations related to benefit-sharing and provides detailed guidance on a range of key issues of

[1] In addition to "access" and "compliance" being another two pillars, see Thomas Greiber and others, *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing* (IUCN 2012) 12.

[2] Michael A Gollin, 'An Intellectual Property Rights Framework for Biodiversity Prospecting' in Walter V. Reid and others (eds), *Biodiversity Prospecting: Using Genetic Resources for Sustainable Development* (World Resources Institute 1993) 191.

[3] See Greiber and others (n 1) 83 and Kerry Ten Kate and Sarah A. Laird, *The Commercial Use of Biodiversity: Access to Genetic Resources and Benefit-sharing* (Earthscan 2002) 75.

[4] Greiber and others (n 1) 83.

implementing benefit-sharing.[5] It addresses questions of what it is to be shared and how to share them through provisions relating to, *inter alia*, monetary and non-monetary benefits,[6] measures for capacity-building[7] and negotiations of mutually agreed terms (MAT).[8] It envisages benefit-sharing at both inter-State and intra-State levels, that is, between provider Parties and user Parties as well as between States and ILCs, who live within States' territories. Based on various binding and non-binding instruments, the normative standards of fairness and equity have also been articulated to guide the implementation of benefit-sharing obligations.[9] In the broader context of international law, benefit-sharing is an emerging legal principle in the standard-setting processes and scholarly discussions of issues relating to, *inter alia*, health, the use of marine biological resources, and ILCs' human rights pertaining to lands and natural resources.[10] In scholarly literature, benefit-sharing has been conceptualised by

---

[5] See Matthias Buck and Clare Hamilton, 'The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity' (2011) 20 (1) Review of European Community & International Environmental Law, 47, Elsa Tsioumani, 'Access and Benefit Sharing: The Nagoya Protocol' (2010) 40 (6) Environmental Policy and Law, 288 and discussions in Elisa Morgera, Matthias Buck and Elsa Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013) 9.

[6] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization [adopted 29 October 2010, entered into force 12 October 2014] CBD Decision 10/1, anx 1.

[7] ibid art 22(5)(j).

[8] ibid art 6(3)(g).

[9] The standards and implications of fair and equitable have been debated from different perspectives, see Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (2016) 27 (2) European Journal Of International Law, 362, Kimberly R. Marion Suiseeya, 'Negotiating the Nagoya Protocol: Indigenous Demands for Justice' (2014) 14 (3) Global Environmental Politics, 104 and Konstantia Koutouki and Katharina Rogalla Bieberstein, 'The Nagoya Protocol: Sustainable Access and Benefits-sharing for Indigenous and Local Communities' (2012) 13 (3) Vermont Journal of Environmental Law, 516.

[10] For a discussion about benefit-sharing in various sections see essays in Evanson C. Kamau and Gerd Winter (eds), *Common Pools of Genetic Resources: Equity and Innovation in International Biodiversity Law* (Routledge 2013). More specific discussion about marine GR and ILCs' human rights, see Bevis Fedder, *Marine Genetic Resources, Access and Benefit Sharing: Legal and Biological Perspectives* (Routledge 2013) 18 and Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (Second edn, Brill Nijhoff 2016) 267.

Morgera as a "concerted and dialogic process aimed at building partnerships in identifying and allocating economic, socio-cultural and environmental benefits among State and non-State actors", encompassing a number of normative elements such as the nature and format of the shared benefits, the legitimate beneficiaries and the standards of fairness and equity.[11] This chapter builds upon Morgera's proposition of a "fully-fledged" mutually supportive interpretation between international biodiversity law and international human rights law of benefit-sharing[12] and aims at addressing the particular normative gap as well as overlap between the Nagoya Protocol and relevant human rights law. I focus on the interpretation and implementation of the provisions on benefit-sharing of the Nagoya Protocol with respect to ILCs and look at the human rights implications on States' obligations.

The chapter consists of three sections. It starts with a section unpacking the fundamental elements of benefit-sharing envisaged by the Nagoya Protocol. It addresses the following questions. What are the benefits and how to share them? Who are the beneficiaries? What are the rights and obligations of these beneficiaries, especially the ILCs? What are the obligations of State Parties in order to ensure benefit-sharing, especially with respect to intra-State benefit-sharing with ILCs? What are the normative and practical implications of the standards "fair and equitable"? The second section investigates the relationship between the ABS rights and the human rights of ILCs as well as the correlated obligations imposed upon States via the lens of three substantive human rights, namely, the right to equality and non-discrimination, the right to development and to property. This is because the realisation of fair and equitable benefit-sharing as envisaged by the Nagoya Protocol requires an articulation of Parties' intra-State obligations owed to ILCs and a comprehensive understanding of

[11] Morgera (n 9) 382.

[12] Elisa Morgera, 'Under the Radar: Fair and Equitable Benefit-sharing and the Human Rights of Indigenous Peoples and Local Communities related to Natural Resources' (2019) (Online) International Journal of Human Rights, 13.

the fact that ILCs, as the stewards of biodiversity and holders of TK, have intrinsic rights and claims over their GR and TK.[13] In this regard, I argue that the emerging trend in incorporating benefit-sharing in the international human rights law to realise, for instance, ILCs' rights to equality, development and property provide the most significant normative ground for theorising the conceptual elements and procedural standards of benefit-sharing.[14] I thus analyse the extent to which these two sets of rights may/or may not assist one another in their realisation and explore the implications of States' human rights obligations in the context of benefit-sharing with respect to ILCs. These remarks are elaborated in the final section.

1. Fair and equitable benefit-sharing under the Nagoya Protocol

Fair and equitable benefit-sharing is the objective of the Nagoya Protocol, which is expected to be achieved through access to GR, the transfer of relevant technologies and funding.[15] Built upon relevant provisions of the CBD, a range of operative clauses in the Protocol articulates the core rights, obligations and procedural requirements of benefit-sharing.[16] The Annex of the Protocol also includes an indicative and non-exhaustive list of potential monetary and non-monetary benefits for benefit-sharing.[17] This section unpacks these benefit-sharing provisions in four sections. The first section asks what the benefits are and how to share them. An essential means for this purpose—technology transfer—is analysed in depth based on the treaty provisions as well as their current implementation. The second section addresses the core ABS

[13] Elisa Morgera, Elsa Tsioumani and Matthias Buck, *Unraveling the Nagoya Protocol: A Commentary on the Nagoya Protocol on Access and Benefit-sharing to the Convention on Biological Diversity* (Brill 2014) 374 and Siegfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) 22 (1) European Journal Of International Law, 140.

[14] Morgera (n 12) 13.

[15] Nagoya Protocol, art 1.

[16] ibid arts 5 9 10 19 20 and 23.

[17] Greiber and others (n 1) 28.

beneficiaries, namely, the provider Party and ILCs of the concerned GR and TK and their relationship.[18] The third section examines Parties' obligations to implement benefit-sharing at both inter-State and intra-State levels, while focusing on the intra-State level where ILCs are identified as ABS beneficiaries. MAT as a procedural safeguard for ensuring fair and equitable benefit-sharing is also analysed. The final section looks at the core normative standard for benefit-sharing, "fair and equitable", and discusses its implication with a sharpened focus on ILCs.

1.1 Realisation of monetary and non-monetary benefits: technology transfer in contexts

Three means for realising fair and equitable benefit-sharing are provided in the Nagoya Protocol: A) appropriate access to GR, B) appropriate transfer of relevant technologies, and C) appropriate funding.[19] The Preamble of the Nagoya Protocol emphasises on the importance of legal certainty and the standards of equity and fairness in the process of negotiations between users and providers of GR.[20] Article 5(4) of the Protocol articulates that the benefits may be monetary or non-monetary and an indicative and non-exhaustive list of what these benefits may entail is further provided in the Annex. Specifically, taken *verbatim* from Appendix II of the Bonn Guidelines,[21] monetary benefits may include, *inter alia*, access fees and payments, licence fees in case of commercialisation, research funding, joint ventures and relevant intellectual property ownership.[22] Non-monetary benefits may include, *inter alia*, sharing of research and development results, collaboration, cooperation and contribution in scientific research and development programmes, education and training for capacity-development in the

[18] Note that in domestic context, this might vary according to different national approaches to establish ABS beneficiaries.

[19] Nagoya Protocol, art 1 and Morgera, Tsioumani and Buck (n 13) 48.

[20] Nagoya Protocol, pmbl.

[21] Greiber and others (n 1) 28.

[22] Nagoya Protocol, anx 1.

provider Party, transfer to the provider of the GR of knowledge and technology under fair and most favourable terms, institutional capacity-building, social recognition and access to scientific information and technology relevant to conservation and sustainable use of biological diversity.[23] Furthermore, based on Articles 15, 16, 18 and 19 of the CBD, Article 23 of the Nagoya Protocol requires Parties to collaborate and cooperate in technical and scientific research and development programmes on the one hand, and foresees its Parties to undertake to promote and encourage access to technology by, and transfer of technology to, developing country Parties on the other hand.[24]

These articulations of monetary and non-monetary benefits demonstrates the various ways in which research, development and commercialisation of GR could be considered for fair and equitable benefit-sharing. They provide Parties with a toolbox from which they may decide what benefits and/or a combination of benefits are the most desirable for individual ABS transactions on a case-by-case basis.[25] Particular attention is placed on technology transfer, which is regarded not only as a subject of benefit-sharing,[26] an essential means for the realisation of the overall objectives of the Nagoya Protocol,[27] but also as a standalone obligation for Parties in relation to collaboration and cooperation.[28] This indicates the key role attributed to technology transfer in the context of benefit-sharing. Nevertheless, it remains unclear how technology transfer and its related obligations are linked to other benefit-sharing provisions under the Nagoya Protocol, especially with respect to ILCs. The following

[23] ibid anx 2.

[24] ibid art 20.

[25] Greiber and others (n 1) 28. 28.

[26] Technology as non-monetary benefits.

[27] In addition to access to GR and appropriate funding, see Morgera, Tsioumani and Buck (n 13) 314.

[28] Nagoya Protocol, art 23.

paragraphs thus look at relevant provisions of technology transfer and the current implementation at both international and national levels.

As mentioned, Article 23 of the Protocol provides two sets of obligations for Parties in the context of technology transfer and cooperation. It first states, "Parties *shall* collaborate and cooperate in technical and scientific research and development programmes" and then provides that "Parties *undertake* to promote and encourage access to technology by, and transfer of technology to, developing country Parties".[29] This Article builds upon the CBD provisions. Specifically, Article 16 of the CBD obliges Parties to provide or facilitate access to, and transfer of, relevant technologies to provider countries under fair and most favourable terms, including on concessional and preferential terms.[30] It further requires Parties to take legislative, administrative or policy measures, with the aim that provider Parties of GR are provided access to and transfer of technology with respect to the utilisation of those resources based on MAT. Contracting Parties are also obligated to take measures with the aim that the private sector facilitates access to, joint development and transfer of technology for the benefit of both governmental institutions and the private sector of developing countries.[31] To contrast and compare these provisions, it can be observed that although Article 23 of the Protocol clearly subtracts its content from the technology transfer-related provisions in the CBD, the CBD imposes an obligation for Parties of technology transfer more assertively. The Nagoya Protocol suggests a "softer" responsibility by using a best-endeavours clause, "to undertake", that implies a general commitment, instead of a concrete obligation as it is established for collaboration and cooperation.[32] In other words, the Nagoya Protocol does not impose an obligation for Parties to take

[29] ibid art 23.

[30] Convention on Biological Diversity [adopted 5 June 1992, entered into force 29 December 1993] 1760 UNTS 79, art 16(2).

[31] ibid art 16(3).

[32] Greiber and others (n 1) 216.

measures to ensure technology transfer or articulate its standards.[33] It also abstains from addressing the role of the private sector in relation to technology transfer. This approach has been criticised by Nijar in the sense that it creates "a fundamental imbalance" in the Protocol, as "its access provisions build upon and advance those in the CBD, while, in stark contrast, the technology transfer provisions detract from the CBD provisions".[34]

To counter-balance this shortcoming, it is plausible to suggest that, since the Nagoya Protocol is adopted under the CBD framework and that all Parties to the Nagoya Protocol are also Parties to the CBD, their obligations shall be understood in the context of the CBD; therefore, the States Parties of the Nagoya Protocol also bear the more elaborated obligations vis-à-vis technology transfer as enshrined in the CBD.[35] The Conference of Parties serving as the meeting of Parties (COP-MOP) to the Nagoya Protocol has not yet taken up this approach to interpret Parties' obligations but is increasingly engaging in elaborating the terms and methods for promoting and supporting the effective access to and transfer of relevant technology among Parties to the Convention.[36] For instance, the COP-MOP has reiterated the importance of developing specific approaches to technology transfer and cooperation to address the prioritised needs[37] and meanwhile, avoiding non-specific, global approaches to this issue.[38] To look at the current implementation at the international level, an overarching programme "The Bio-Bridge Initiative (BBI)" is founded under the CBD in 2014,

[33] That is, according to the CBD, under most favourable terms, including on concessional and preferential terms.

[34] Gurdial Singh Nijar, 'The Nagoya Protocol on Access and Benefit Sharing of Genetic Resources: Analysis and Implementation Options for Developing Countries' (2011), 30.

[35] See Greiber and others (n 1) 216 and Nijar (n 34) 36.

[36] CBD COP Decision X/16, 'Technology Transfer and Cooperation' (29 October 2010) UN Doc UNEP/CBD/COP/DEC/X/16 para 1.

[37] CBD COP Decision VIII/12, 'Technology Transfer and Cooperation' (15 June 2006) UN Doc UNEP/CBD/COP/DEC/VIII/12 pmbl.

[38] X/16 (n 36) para 3.

aiming at catalysing and facilitating technical and scientific cooperation.[39] One of its ongoing project, Francophone African ABS Legal Network Project, explicitly addresses technology transfer in the context of benefit-sharing.[40] At the national level, as identified in the most recent report on the effectiveness of the Nagoya Protocol, released at the 2018 COP 14 held in Egypt, about half of Parties claim that they had collaborated and cooperated in technical and scientific research and development programmes as a means to achieve the objective of the Protocol as provided in Article 23.[41] Thus, it can be observed that the implementation of technology transfer takes place in various forms even though the normative connotation of technology transfer under the Nagoya Protocol has not been sufficiently clarified in COP decisions.

What is the role of ILCs in technology transfer? Three contexts are relevant for understanding Parties' obligations on technology transfer and its potential impacts on ILCs. First, as an essential means to facilitate "a flow of goods and knowledge", technology transfer is capable of providing opportunities for learning and capacity-building in developing countries.[42] It can be further realised through scientific and technological cooperation with ILCs when their GR and associated TK is sought and utilised. In this connection, Article 22 of the Protocol explicitly requires Parties to facilitate the involvement of ILCs and support the capacity needs and priorities of ILCs as identified by themselves.[43] Thus, technology transfer can support the capacity-building of ILCs and indicate whether Parties have fulfilled their obligations in this regard. Second, via financial resources and technology transfer provided by developed country Parties, the developing country Parties could be better equipped to implement

[39] CBD, 'Bio-Bridge Initiative' (*CBD*, 2014) <https://www.cbd.int/biobridge/> accessed 02/01/2019.

[40] For more information see ibid.

[41] As of 22 February 2018, see NP MOP 3 Draft Decision, 'Assessment and Review of the Effectiveness of the Protocol' (21 November 2018) UN Doc CBD/NP-MOP/3/L.2 14.

[42] Greiber and others (n 1) 216.

[43] Nagoya Protocol, arts 22(1)(3).

their commitments under the CBD and the Nagoya Protocol.[44] At the national and local levels, Greiber and others have suggested that technology transfer as non-monetary benefit-sharing could contribute to acknowledging and recompensing the related rights and contribution of provider countries and ILCs.[45] Last but not least, the development, adaptation, transfer and diffusion of technology in building of related capacity in achieving sustainable development goals also support and interlink with the ABS objectives.[46] For instance, the Rio Declaration calls upon States to co-operate to strengthen capacity-building for sustainable development through technology transfer.[47] The transfer of environmentally sound technology, co-operation, and capacity-building, including biotechnology, has been regarded as an essential means for implementation in the Agenda 21.[48] The UN 2030 Agenda for Sustainable Development provides further guidance on this issue. In line with the Agenda 21, the 2030 Agenda elaborates that, as a fundamental means of implementation, the mobilisation of financial resources as well as capacity-building and the transfer of environmentally sound technologies to developing countries shall be on favourable terms, including on concessional and preferential terms, as mutually agreed.[49] Transferring technology with respect to specific areas, including climate change, conservation and sustainable use of marine resources and revitalise global partnership for sustainable development, are also highlighted.[50] Thus, in above-identified contexts, the implications of technology transfer as an essential means to achieve fair and

[44] CBD, art 20.

[45] Greiber and others (n 1) 218.

[46] ibid 217.

[47] Rio Declaration on Environment and Development [12 August 1992] UN Doc A/CONF.151/26 (Vol. I), Principle 9.

[48] UNGA, 'Report of the United Nations Conference on Environment and Development' (June 1992) UN Doc A/CONF.151/26 ch 34.

[49] UNGA Res 70/1, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (21 October 2015) UN Doc A/RES/70/1 para 41.

[50] ibid paras 35 14(a) and 17(7).

equitable benefit-sharing can be further stretched, in which ILCs should be an important concern of States not only to fulfil their obligations under the CBD and the Nagoya Protocol, but also under general international law with respect to sustainable development.

1.2 Beneficiaries and their interpretative and implementation dilemmas

This section examines the issue of ABS beneficiaries. The Nagoya Protocol addresses the question of who shall benefit from the utilisation of GR and associated TK via three paragraphs in Article 5 in following terms:

> 1. In accordance with Article 15, paragraphs 3 and 7 of the Convention, benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization shall be shared in a fair and equitable way with the Party providing such resources that is the *country of origin* of such resources or a Party that has acquired the genetic resources in accordance with the Convention. Such sharing shall be upon mutually agreed terms.
>
> 2. Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by Indigenous and local communities, in accordance with domestic legislation regarding the *established rights* of these Indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.
>
> 5. Each Party shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with Indigenous and local communities holding such knowledge. Such sharing shall be upon mutually agreed terms.[51]

[51] Nagoya Protocol, art 5. Emphasis added.

As emphasised, the Nagoya Protocol envisages two types of beneficiaries. The first is the provider Party of the concerned GR, which shall be either the country of origin of such resources, or a Party that has acquired the resources in accordance with the Convention.[52] The second is ILCs in situations where they have established rights over concerned GR or it is benefit-sharing in relation to TK associated with GR held by them.[53] The following paragraphs discuss each beneficiary in turn.

1.2.1 Country of origin

Proposed by developing countries to the CBD Working Group on ABS just before the adoption of the Protocol in 2010, the term "country of origin" is included in the core provisions of benefit-sharing as well as access.[54] According to the CBD, it means the country that possesses GR in *in-situ* conditions—where generic resources exist within ecosystems and natural habitats—and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.[55] There are several facts about GR that might result in practical difficulties of identifying the country of origin under the CBD definition. First, plants, animals and microorganism that contain GR are subject to natural reproduction processes, which could, and often do, span across political boundaries.[56] Anthropogenic interventions, such as crossbreeding and trading, could also introduce species across countries and result in "new" species through cultivation.[57] As species become extinct and/or new species

[52] ibid art 5(1) and CBD, art 15(3)(7).

[53] Nagoya Protocol, art 5(2)(5).

[54] ibid arts 5 and 6 and CBD Working Group on ABS, 'Report of the First Part of the Ninth Meeting of the Ad Hoc Open Ended Working Group on Access and Benefit-Sharing' (26 April 2010) UN Doc UNEP/CBD/WG-ABS/9/3 paras 31 43 and 44.

[55] CBD, art 2.

[56] See essays in T. Luoma-aho and others (eds), *Forest Genetic Resources Conservation and Management* (International Plant Genetic Resources Institute 2004).

[57] For scientific evidence see Kenneth F. Raffa and others, 'Cross-scale Drivers of Natural Disturbances Prone to Anthropogenic Amplification: The Dynamics of Bark Beetle Eruptions' (2008) 58 (6) BioScience, 501.

discovered/cultivated, the country of origin of a certain species may not be so in the future, or be replaced by another country that provides more hosting habitats due to various factors, for instance, climate change. Thus, the term country of origin is not a static concept, which may complicate the process of identifying legitimate beneficiaries for ABS purposes. Furthermore, as it becomes popular to seek GR from genebanks and *ex situ* collections, instead of the country where the sought GR exists in *in-situ* conditions, users of GR may favour provider countries with the minimum ABS requirements. Essentially, these facts pose challenges to identifying which country is the country of origin and raise concerns about how to ensure fair and equitable benefit-sharing with the country of origin. These two concerns are equally valid in a community context, in which the same GR and associated TK might be held simultaneously by several ILCs.

1.2.2 ILCs or IPLCs? A sleight of hand of the CBD Parties

The term "ILCs" is not defined in the Nagoya Protocol or the CBD. Nevertheless, Parties of the CBD has accepted a "potentially useful"[58] list of key characteristics of "local communities" submitted by the CBD Working Group on Article 8(j). This "broad and inclusive" list highlights ILCs' right to self-identification,[59] including characteristics such as traditional lifestyle, definable territory and existence of customary rule.[60] With respect to the Indigenous communities, the CBD term "ILCs", as it eschews recognising Indigenous peoples as "peoples", has been criticised by

[58] CBD COP Decision XI/14, 'Article 8(j) and related Provisions' (5 December 2012) UN Doc UNEP/CBD/COP/DEC/XI/14 para 19.

[59] CBD Working Group on Article 8(j), 'Report of the Expert Group Meeting of Local Community Representatives within the Context of Article 8(j) and Related Provisions of the Convention on Biological Diversity' (4 September 2011) UN Doc UNEP/CBD/WG8J/7/8/Add.1* anx.

[60] ibid anx.

advocates of Indigenous peoples.[61] However, as discussed, “Indigenous people” itself is also an undefined term in international law.[62] In scholarly literature, Morgera has observed that the understanding of the key characteristics of local communities under the CBD actually has much in common with the debated term of Indigenous peoples.[63] While the discourse over the exact meaning of the term ILCs and its relationship with other alternatives, such as Indigenous peoples and local communities (IPLCs), remains inconclusive, it is in general accepted under the CBD that self-identification is the most appropriate way to establish who may be Indigenous and/or a local and/or a traditional community representative.[64]

ILCs appears to be the authoritative term for interpretation as established by the Nagoya Protocol and the CBD. It has also been explicitly adopted in a range of voluntary guidelines, such as the Bonn Guidelines (2002),[65] the Akwé: Kon Guidelines (2004),[66] and the Tkarihwaié:ri Code of Ethical Conduct (2011).[67] Nevertheless, in the COP decisions and voluntary guidelines adopted more recently under the CBD

[61] The United Nations Permanent Forum on Indigenous Issues (PFII), for example, has suggested to the CBD to use the term "Indigenous peoples", see CBD Working Group on Article 8(j), 'Compilation of Views Received on Use of the Term "Indigenous Peoples and Local Communities"' (17 September 2013) UN Doc UNEP/CBD/WG8J/8/INF/10/Add.1 secs 3 and 4.

[62] See discussions about IPLCs in previous sections 1.2 and 2.1.2 of chapter one and section 3.1 of chapter two.

[63] Morgera (n 12) 3.

[64] CBD Expert Group Meeting of Local Community Representatives, 'Guidance for the Discussions concerning Local Communities within the Context of the Convention on Biological Diversity' (7 July 2011) UN Doc UNEP/CBD/AHEG/LCR/1/2 para 7.

[65] CBD COP Decision VI/24, 'Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization ' (27 May 2002) UN Doc UNEP/CBD/COP/6/20.

[66] CBD COP Decision VII/16, 'Akwé: Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities' (13 April 2004) UN Doc UNEP/CBD/COP/DEC/VII/16.

[67] CBD COP Decison X/42, 'The Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities' (29 October 2010) UN Doc UNEP/CBD/COP/DEC/X/42.

framework, the term "IPLCs" has replaced ILCs, for instance, in the Mo'otz Kuxtal Voluntary Guidelines (2016)[68] and the Rutzolijirisaxik Voluntary Guidelines (2018).[69] This terminological change is decided in the COP 12 in 2014.[70] In this meeting, in response to the recommendations made by the UN Permanent Forum on Indigenous Issues (PFII) that the CBD shall use the terminology IPLCs and recognise in full its legal implications,[71] the CBD Parties agreed that the IPLCs would be used in their future decisions and secondary documents as appropriate. However, they meanwhile have rejected almost all the legal implications that might be derived therefrom. In particular, the CBD Parties stress that this usage is only on an exceptional basis, which according to the UN Office of Legal Affairs, would not be construed as a "subsequent agreement" and should not be taken into account for purposes of interpreting or applying the CBD.[72] Specifically, the CBD Parties have decided that the term IPLCs; A) shall not affect in any way the legal meaning of Article 8(j) and related provisions of the Convention, B) may not be interpreted as implying for any Party a change in rights or obligations under the Convention, and C) shall not constitute a context for the purpose of interpretation of the CBD as provided for in Article 31, paragraph 2, of the Vienna Convention on the Law of Treaties (VCLT) or a subsequent agreement or

[68] CBD COP Decision XIII/18, 'Mo'otz Kuxtal Voluntary Guidelines for the Development of Mechanisms, Legislation or other Appropriate Initiatives to Ensure the "Prior and Informed Consent", "Free, Prior and Informed Consent" or "Approval and Involvement", depending on National Circumstances, of Indigenous Peoples and Local Communities for Accessing their Knowledge, Innovations and Practices, for Fair and Equitable Sharing of Benefits arising from the Use of their Knowledge, Innovations and Practices relevant for the Conservation and Sustainable use of Biological Diversity, and for Reporting and Preventing Unlawful Appropriation of Traditional Knowledge' (17 December 2016) UN Doc CBD/COP/DEC/XIII/18.

[69] CBD COP Decision 14/12, 'Rutzolijirisaxik Voluntary Guidelines for the Repatriation of Traditional Knowledge of Indigenous Peoples and Local Communities Relevant for the Conservation and Sustainable Use of Biological Diversity' (30 November 2018) UN Doc CBD/COP/DEC/14/12.

[70] CBD COP Decision XII/12, 'Article 8(j) and related Provisions' (13 October 2014) UN Doc UNEP/CBD/COP/DEC/XII/12 sec F.

[71] XI/14 (n 58) sec G para 2.

[72] CBD Secretariat, 'Analysis on the Implication of the Use of the Term "Indigenous peoples and local communities" for the Convention and its Protocols' (25 June 2014) UN Doc UNEP/CBD/COP/12/5/Add.1 para 14.

subsequent practice among Parties to the CBD as provided for in Article 31, paragraph 3 (a) and (b) or special meaning as provided for in Article 31, paragraph 4, of the VCLT.[73] The Parties further articulate that any change to the legal meaning of the original terminology "ILCs" should be done via the amendment procedure set out in Article 29 of the CBD.[74] Thus, although the term IPLCs has made its way into the CBD framework, its legal implications are greatly limited by the Parties. The event seems like a technical sleight of hand deployed by the CBD Parties: accepting the politically correct term Indigenous peoples on the surface, while blocking almost every possible way for it to make a substantive legal implication by posing complex restriction on its interpretation. Nevertheless, the door for a systemic interpretation on the basis of Article 31(3)(c) of the VCLT remains open. Perhaps more importantly, the Parties have also implicitly envisaged the possibility of altering the obligations imposed by the CBD via an amendment, which could be and shall be guided by the principle of mutual supportiveness. This is quite significant as it does not only indicated the willingness of the CBD Parties to accept interpretation of their obligations in light of other relevant rules of international law,[75] but also to update their obligations in accordance with the development of international law in the future. It is especially important in understanding the implications of IPLCs in light of international human rights standards.

To conclude, both types of ABS beneficiaries face interpretative and implementation dilemmas. On the one hand, the term "country of origin" is explicitly defined under the CBD, but the practical complexity of identifying whom exactly is the country of origin remain difficult to address. On the other hand, the term "ILCs", as the authoritative term for interpreting and implementing ABS-related provisions of

[73] Vienna Convention on the Law of Treaties [adopted 23 May 1969, entered into force 27 January 1980] 1155 UNTS 331 and XII/12 (n 70) 16.

[74] XII/12 (n 70) 16.

[75] As discussed in section 2.1.3 of chapter one.

the Nagoya Protocol and the CBD, has undergone some terminological changes.[76] The CBD Parties have decided to use "IPLCs" instead of ILCs—a gesture of recognising Indigenous peoples as peoples—but only superficially. From the first sight, this might be seen as a victory in a battle long fought by the advocates of Indigenous peoples as the CBD Parties finally agree to integrate concerns of "Indigenous peoples" into its future agenda—a term that implies stronger international legal recognition and human rights protection. However, as demonstrated, this terminological change might only be a sleight of hand by the CBD Parties, as it has created only minimum space for interpretation and implementation in light of international human rights standards vis-à-vis Indigenous peoples. This event indicates the political reluctance of States to fully endorse the IPLCs and their legal significance, and meanwhile the increasing international pressure for States to do so. The possibility of a systemic interpretation based on Article 31(3)(c) of VCLT and a mutually supportive implementation at the law-making level, as suggested by scholars such as Morgera and Savarasi, thus is ever more relevant to be scrutinised.[77] I pursue this goal in the following section 2, in light of the international human rights standards established for IPLCs.

1.3 Obligations of Parties vis-à-vis benefit-sharing

Builds upon the previous analysis of the means for benefit-sharing and its beneficiaries, this section examines Parties' obligations to implement benefit-sharing in two parts. The first part addresses the obligations of Parties to ensure fair and equitable benefit-sharing at both inter-State and intra-State levels based on Article 5 of the Nagoya Protocol. Focusing on the intra-State level that concerns ILCs as beneficiaries, I

[76] 8(j), *Compilation of Views Received on Use of the Term "Indigenous Peoples and Local Communities"* (n 61) 5.

[77] Annalisa Savaresi, 'The International Human Rights Law Implications of the Nagoya Protocol' in Elisa Morgera, Matthias Buck and Elsa Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-Sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013) 60 and Morgera, Tsioumani and Buck (n 13) 147.

distinguish the obligations imposed upon Parties with respect to GR over which ILCs have established rights, and TK associated with GR held by ILCs. The outstanding feature of the latter obligation vis-à-vis ILCs' TK is highlighted, as it appears the only occasion in the Protocol where the reference to domestic law is absent. In this light, I suggest this feature opens the floor to consider the ABS rights of ILCs of TK in a broader context of international law, especially the international human rights standards. Specifying different situations in which ILCs may be considered as legitimate beneficiaries, it is also observed that not only State Parties, but also non-State actors or even ILCs themselves bear duties in terms of ensuring fair and equitable benefit-sharing. The second part investigates the "mutually agrees terms" (MAT) as a procedural safeguard for ensuring fair and equitable benefit-sharing. Parties' obligation to encourage the development and use of model contractual clauses, voluntary codes of conduct, best practices and ILCs' customary rules is highlighted.[78] This part concludes with an analysis of the potential risks of implementing MAT as a private-law contract, which links to the next section on fair and equitable standards.

1.3.1 Obligations of benefit-sharing at inter-State and intra-State levels

According to Article 5 of the Nagoya Protocol, Parties are obliged to take legislative, administrative or policy measures: A) as appropriate, to ensure that benefits arising from the utilisation of GR as well as subsequent applications and commercialisation are shared in a fair and equitable way with the provider Party; [79] B) with the aim of ensuring, that the benefits arising from the utilisation of GR held by ILCs are shared with the concerned ILCs, in accordance with domestic legislation regarding their established rights over GR; and C) as appropriate, in order that benefits arising from

[78] See in general Tomme R. Young and Morten W. Tvedt, *Drafting Successful Access and Benefit-sharing Contracts* (Brill 2017) 22 and Winter Gerd and Kamau Evanson Chege, 'Model Clauses for Mutually Agreed Terms on Access to Genetic Resources and Benefit Sharing' (2016) 12 (1) Law, Environment and Development Journal, 18.

[79] Nagoya Protocol, art 5(3).

the utilisation of TK associated with GR are shared in a fair and equitable way with ILCs holding such knowledge.[80] These obligations foresee the implementation of the Nagoya Protocol at both inter-State and intra-State levels. With respect to inter-State benefit-sharing, paragraphs 1 and 3 of Article 5 envisage Parties' benefit-sharing obligations to take measures to ensure fair and equitable benefit-sharing between the users and the provider Parties.[81] In this context, the benefits that shall be shared are the ones arising from the "utilization of GR" as well as "subsequent applications and commercialization". Based on the benefit-sharing obligations established under the CBD about "commercial and other utilization" of GR, the Nagoya Protocol defines the term "utilisation of GR" as "conduct research and development" (R&D) on the genetic and/or biochemical composition of GR, including through the application of biotechnology.[82] It further clarifies that "biotechnology" means any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use.[83] In comparison, the term "subsequent applications and commercialization" remains undefined in the Protocol. Nevertheless, it reflects the understanding achieved in the negotiation process, that benefit-sharing needs to cover the whole value chain, which often contains different stages of R&D and can lead to various products.[84]

Intra-State benefit-sharing concerns ILCs as beneficiaries. Specifically, in situations where, A) GR over which ILCs have "established rights" in accordance with domestic legislation, and/or B) TK associated with GR held by ILCs, are utilised, Parties are obliged to take measures to ensure fair and equitable benefit-sharing with the concerned ILCs. The Nagoya Protocol does not define what exactly "utilisation of

[80] ibid art 5(5).

[81] Morgera, Tsioumani and Buck (n 13) 114.

[82] Nagoya Protocol, art 2(c).

[83] ibid art 2(d).

[84] Greiber and others (n 1) 85.

TK" means. Nevertheless, it imposes assertive benefit-sharing obligations with respect to ILCs, compared to the CBD that only "encourages" Parties to ensure benefit-sharing subject to their national legislation. Furthermore, when addressing benefit-sharing based on ILCs' TK, the Nagoya Protocol uses far fewer caveats and does not refer to domestic legislation at all, compared to the provisions on GR that are conditioned by several qualifies such as "with the aim of ensuring" and "in accordance with domestic legislation".[85] This is worth noting because it appears the only occasion where the reference to domestic law is absent when articulating Parties' obligation to ensure benefit-sharing.[86] This could be read in light of the international legal developments of recognising and protecting ILCs' rights over TK in other fields, especially human rights and intellectual property rights (IPRs) of ILCs.[87] The implication is that the protection of TK and ILCs' rights over TK is a matter of international human rights obligation that requires States to take into account international standards when formulating domestic laws and policies, rather than subjecting the protection of TK to their respect domestic legal framework.[88]

Furthermore, benefit-sharing at the intra-State level links to the issues about capacity-building and development of ILCs.[89] Developing country Parties are required to support "the capacity needs and priorities" of ILCs and relevant stakeholders as identified by themselves, while identifying their own national capacity needs and

[85] Nagoya Protocol, art 5(5).

[86] See the discussion in chapter two about the fact that the access-related provisions in the Protocol have made constant references to "domestic law". ibid arts 6 and 7.

[87] See in general, Volker Heins, 'Human Rights, Intellectual Property, and Struggles for Recognition' (2008) 9 Human Rights Review, 217 and Peter K. Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2007) 40 (3) UC Davis Law Review, 1149.

[88] Sub-Commission on the Promotion and Protection of Human Rights, 'Intellectual Property Rights and Human Rights' (2000) UN Doc E/CN.4/Sub.2/RES/2000/7 paras 3-6 and Greiber and others (n 1) 89. A detailed discussion on this point continues in the following section 2.3 in this chapter.

[89] Nagoya Protocol, art 22.

priorities through "national capacity self-assessment".[90] An indicative and non-exhaustive list of possible measures for capacity-building is also provided, including, special measures to increase the capacity of ILCs with emphasis on enhancing the capacity of women within those communities.[91] This reflects in the consensus achieved under the Nagoya Protocol that the COP-MOP of the Nagoya Protocol is obliged to take into account the capacity needs and priorities of ILCs, including women within these communities, when providing guidance with respect to the financial mechanism.[92] The concern of capacity-building of ILCs thus is embedded in Parties' obligations with a particular focus on the inclusion of women within ILCs.[93] In the most recent COP 14 in November 2018, while assessing the effectiveness of the Protocol, Parties have identified the need to support the capacity-building of IPLCs with respect to ABS issues, for instance, minimum requirements for MAT.[94]

When considering the intra-State obligations of State Parties via-a-vis ILCs, it is necessary to distinguish specific situations in which the content of such obligations may vary. These situations include: A) States share benefits with ILCs who live within their territories; B) non-State actors negotiate MAT and share benefits with ILCs under the supervision and/or facilitation of State governments; C) benefit-sharing among ILCs and within communities. Each situation illuminates a distinctive dimension of the relationship involved in intra-State benefit-sharing among States, ILCs, and other non-State actors. It demonstrates the fact that not only State Parties, but also non-State actors or even ILCs themselves may bear duties in terms of ensuring fair and equitable benefit-sharing. Consequentially, the obligations of State Parties may not only contain regulating the benefit-sharing process between governments and ILCs, but also

[90] ibid art 22(3).

[91] ibid art 22(5)(j).

[92] ibid art 25 (3).

[93] The issue of the rights of women in benefit-sharing is addressed in detail in the following section 2.1.2.

[94] Decision (n 41) anx 10.

ensuring the fair and equitable benefit-sharing in the situations B and C via appropriate facilitation and administrative measures. Having said that, it is also fundamental to note the fact that there persist enormous power disparities among stakeholders, in particular between multinational corporations and ILCs, as well as State governments and ILCs.[95] This fact should not be overlooked in articulating States' benefit-sharing obligations, and is discussed in greater details in conjunction with the human rights obligations of States in the following section 2 below.

1.3.2 MAT as a procedural safeguard

In accordance with Article 5 of the Nagoya Protocol, the obligations vis-à-vis benefit-sharing at both inter-State and intra-State levels shall be upon MAT.[96] MAT as a procedural requirement is also included in several CBD provisions with respect to access to GR and benefit-sharing,[97] access to and transfer of technology[98] and handling of biotechnology and distribution of its benefits.[99] Often established in a form of "a private-law contract", MAT implies a negotiation between the Party granting access to GR and any entity aiming to utilise those resources, such as individuals, companies, or research institutions.[100] Ideally, it should construct an "effective and easily enforceable way" to ensure the realisation of benefit-sharing obligations through compliance with international and domestic private laws.[101] This objective is facilitated by a range of procedural requirements and there are divergent opinions

[95] Morgera, Tsioumani and Buck (n 13) 7.

[96] Nagoya Protocol arts 5(2)(5).

[97] ibid arts 15(4)(7).

[98] ibid arts 16(2)(3).

[99] ibid art 19(2).

[100] Greiber and others (n 1) 9.

[101] Nagoya Protocol, art 18. Morgera, Tsioumani and Buck (n 13) 131.

about its actual effectiveness.[102] The following paragraphs firstly investigate the legal text and then discuss the challenges facing its implementation.

A list of minimum requirements on the content of MAT is provided in the Nagoya Protocol in relation to Parties' obligations to regulate PIC for accessing GR, including, dispute settlement clauses, terms on benefit-sharing, subsequent third-party use and changes of intent.[103] Detailed model contractual terms for MAT have also been proposed by legal scholars, taking a rather neutral position vis-à-vis the interests of both the providers and users.[104] With a sharpened focus on ILCs, the Protocol also obliges Parties to support ILCs to develop minimum requirements for MAT and model contractual clauses for benefit-sharing with respect TK associated with GR.[105] To support the implementation of MAT, Articles 19 and 20 of the Nagoya Protocol impose obligations on Parties to encourage "the development, update, and use of sectoral and cross-sectoral model contractual clauses",[106] as well as "voluntary codes of conduct, guidelines, and best practices and/or standards".[107] The COP-MOP is also obliged to take stock of the use of these model and voluntary standards periodically.[108] Against this background, a COP-MOP decision is adopted in 2014 to encourage tools developed under Articles 19 and 20 of the Protocol to be shared openly on the Access and Benefit-sharing Clearing-House.[109] Notably, not only Parties and State Governments are encouraged to do so, but also international organisations, ILCs and

---

[102] See Brendan Tobin, 'Biodiverstiy Prospecting Contracts: The Search for Equitable Agreements' in Sarah A. laird (ed), *Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice* (Earthscan 2010) 291 and Young and Tvedt (n 78) 2.

[103] Nagoya Protocol, art 6(3)(g).

[104] Gerd and Evanson Chege (n 78) 20 and Young and Tvedt (n 78) 22.

[105] However, this obligation does not refer to GR held by ILCs. See Nagoya Protocol, arts 12(3)(b)(c).

[106] ibid art 19(1).

[107] ibid art 20(1).

[108] ibid arts 19 (2) and 20(2).

[109] NP MOP 1 Decision NP-1/5, 'Model Contractual Clauses, Voluntary Codes of Conduct, Guidelines and Best Practices and/or Standards (Articles 19 and 20)' (20 October 2014) UN Doc UNEP/CBD/NP/COP-MOP/DEC/1/5.

relevant stakeholders.[110] Specifically, the decision includes legal tools that have been developed prior to the Nagoya Protocol (2010), as well as ILCs' customary laws, community protocols and procedures.[111] If fully implemented, these provisions could create a facilitative environment for successful negotiations and efficient executions of fair and equitable benefit-sharing agreements, while supporting the development and respecting ILCs' customary rules in the process of negotiating and implementing benefit-sharing terms.[112]

While MAT serves as a procedural safeguard for realising the objective of ABS, its implementation face several challenges. First, as MAT are usually negotiated at the point of access, it does not necessarily promise a fair and equitable outcome of benefit-sharing as the utilisation takes place.[113] Second, envisaging a contractual relationship between the providers and the users, MAT relies on domestic private law, especially contract law, for its establishment and enforcement.[114] Scholarly discussion has revealed the multifaceted problems embedded in this construction, including, *inter alia*, unequal bargaining power between the providers and the users in negotiating contractual clauses for MAT; differences in the conditions of and approaches taken by different jurisdictions to ensure equity and fairness in which MAT are negotiated; varying legal, social and economic capacities of the companies, institutions and ILCs

[110] ibid para 1.

[111] ibid paras 2 and 3.

[112] CBD Working Group on ABS, 'Study on Compliance in Relation to the Customary Law of Indigenous and Local Communities, National Law, Across Jurisdictions, and International Law' (6 March 2009) UN Doc UNEP/CBD/WG-ABS/7/INF/5 4.

[113] Gurdial Singh Nijar, 'Incorporating Traditional Knowledge in an International Regime on Access to Genetic Resources and Benefit Sharing: Problems and Prospects' (2010) 21 (2) European Journal Of International Law, 463. Also, see the ABS related laws of Afghanistan, Australia, Bhutan, Bulgaria, Guyana, India, Malawi, Pakistan, Philippines, and South Africa.

[114] Shakeel Bhatti and others (eds), *Contracting for ABS: The Legal and Scientific Implications of Bioprospecting Contracts* (IUCN 2009) 39.

to negotiate a fair and equitable arrangement.[115] Thus, the CBD Working Group on ABS suggests that contract law alone cannot guarantee fairness and equity for ABS purposes and "a domestic legislative and international instrument-based counter balance" is needed.[116] Even in situations where MAT are negotiated between competent national authorities on behalf of ILCs or other stakeholders, it still lacks legal clarity as to how to ensure the concluded terms are in accordance with ILCs' needs, aspirations and customary laws and if not, how to redress the issue.[117] What appears crucial in the above-identified problems is the understanding of "fair and equitable"—what it entails and how it relates to international human rights standards with respect to ILCs. Thus, in order to fully unravel the potential of MAT as a procedural safeguard and understand its limitations in achieving the Protocol's objective, an exanimation of "fair and equitable" is continued in the following section 1.4 and further investigation of the implication of relevant human rights standards is provided in section 2.

1.4 Normative standards of benefit-sharing

Fair and equitable are the core normative standards for benefit-sharing under the international ABS framework, reiterated throughout the text of the CBD and the Nagoya Protocol. They are also increasingly elaborated by the COP decisions and a range of voluntary guidelines adopted by the CBD Parties, especially with respect to

[115] See, in general, Saskia Vermeylen, 'Contextualizing 'Fair' and 'Equitable': The San's Reflections on the Hoodia Benefit-Sharing Agreement' (2007) 12 (4) Local Environment, 427, essays in Evanson C. Kamau and Gerd Winter (eds), *Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit Sharing* vol 19 (Routledge 2009) 309 and Greiber and others (n 1) 211.

[116] ABS, *Study on Compliance in Relation to the Customary Law of Indigenous and Local Communities, National Law, Across Jurisdictions, and International Law* (n 112) 4.

[117] Morgera, Tsioumani and Buck (n 13) 15.

benefit-sharing with ILCs.[118] However, these instruments fall short of defining the notions of "fair" and "equitable". In scholarly discussion, fair and equitable have been approached from difference perspectives and in various contexts.[119] This section looks at the interpretation of the normative standards of fair and equitable as established in the ABS context, focusing on their implications for IPLCs.

1.4.1 Development under the CBD and the Nagoya Protocol

Fair and equitable as standards for benefit-sharing are phrased in several different ways in the binding ABS instruments—the CBD and its Nagoya Protocol. First, as the treaty objective, *fair and equitable sharing of the benefits* is established in Article 1 of the CBD and the Nagoya Protocol. Second, elaborating the obligations of Parties to benefit-sharing, Article 15(7) of the CBD requires that each contracting Party to take measures, with the aim of *sharing in a fair and equitable way* the results of R&D and the benefits arising from the commercial and other utilisation of GR. This phrase has been inherited in Article 5 of the Protocol, which articulates that Parties are obliged to ensure that benefits are shared *in a fair and equitable way* with the provider Parties and/or ILCs.[120] Moreover, in Article 19 of the CBD, Parties are required to "take all practicable measures to promote and advance priority access on *a fair and equitable basis* by Contracting Parties, especially developing countries, to the results and benefits arising from biotechnologies based upon genetic resources provided by those

---

[118] Seethe discussion about the normative development under the international ABS framework in the previous section 2.2.2 of chapter two. See also Stephen Tully, 'The Bonn Guidelines on Access to Genetic Resources and Benefit Sharing' (2003) 12 (1) Review of European Comparative and International Environmental Law, 84 and Morgera (n 9) 360.

[119] As will be discussed, for instance, Vermeylen analyses fair and equitable from a legal anthropological perspective and Francioni discusses the international legal implication of fair and equitable in the context of applying biotechnology, see Vermeylen (n 115) 423 and Francesco Francioni, 'International Law for Biotechnology: Basic Principles' in Francesco Francioni and Tullio Scovazzi (eds), *Biotechnology and International Law* (Hart 2006) 24.

[120] Although to varying degrees of vigorousness, see the discussion in previous section 1.3.

Contracting Parties".[121] Furthermore, recalling the fair and equitable benefit-sharing objective, the Preamble of the Nagoya Protocol highlights the importance of promoting *equity and fairness* in negotiation of MAT between providers and users. In the same line, the Nagoya Protocol explicitly includes "promotion of *equity and fairness* in negotiations" as a measure of capacity-development and provided one example of what this may entail—training to negotiate MAT.[122]

Articles 9 and 10 of the Nagoya Protocol are also relevant in understanding the normative standards of benefit-sharing. Article 9 addresses the direction in which shared benefits should flow— "towards the conservation of biological diversity and the sustainable use of its components".[123] Greber and others have suggested that this could be understood in connection with the possible options for shared benefits,[124] especially the non-monetary ones that could be "more direct, immediately available, long-term, and suited to contributing to conservation".[125] Article 10 envisages a procedural obligation for Parties to "consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable benefit-sharing in transboundary situations or for which it is not possible to grant or obtain PIC".[126] If shared through this potential mechanism, it is also required that the benefits shall be used to support the first two objectives of the CBD on a global scale.[127] Thus, both Articles provided a legal basis for considering the purpose of benefit-sharing that it shall not only be fair and equitable between users and providers, but also in a way

[121] CBD, art 19.

[122] Nagoya Protocol, art 22(5)(b).

[123] Greiber and others (n 1) 28.

[124] See discussions in the previous section 1.1.

[125] Greiber and others (n 1) 88.

[126] Nagoya Protocol, art 10.

[127] ibid.

that could contribute to the overall objectives of the CBD and even beyond the bilateral user-provider paradigm.[128]

These standards imply that not only the shared benefits *per se* shall be fair and equitable, but also the methods and means agreed by the provider and user during the benefit-sharing process.[129] However, as fair and equitable remain undefined under the CBD and the Nagoya Protocol, there are divergent opinions about how to interpret and implement these terms in specific contexts.[130] It remains unclear whether the standards of fairness and equity are to be understood in the context of international law, or outside the law as an autonomous source of principles that are assumed to inspire contractual arrangements.[131] In light of these normative developments vis-à-vis IPLCs under the international ABS framework,[132] it also raises questions about how to integrate IPLCs' perspectives of fair and equitable into ABS negotiations.[133] In general, Tvedt has argued that the Nagoya Protocol does not set any substantive or procedural criteria for establishing MAT to provide for fair and equitable benefit-sharing.[134] In addition, Vermeylen has also pointed out that the CBD as a construct has some structural shortcomings, for instance, relying on the Western notion of exclusive

[128] For a discussion of the potential ways where bilateral approach and multilateral approach to benefit-sharing might be mutually supportive, see Michael Halewood and others, 'Implementing Mutually Supportive Access and Benefit Sharing Mechanisms under the Plant Treaty, Convention on Biological Diversity, and Nagoya Protocol' (2013) 9 (1) Law, Environment and Development Journal, 74.

[129] It has been suggested that the terminology "fair and equitable" serves to make explicit both procedural dimensions of justice (fairness) that determine the legitimacy of certain courses of action, as well as substantive dimensions (equity), see Morgera (n 9) 381.

[130] See Shane P. Mulligan, 'For Whose Benefit? Limits to Sharing in the Bioprospecting 'Regime'' (1999) 8 (4) Environmental Politics, 35, Anthony Artuso, 'Bioprospecting, Benefit Sharing, and Biotechnological Capacity Building' (2002) 30 (8) World Development, 1355 and Vermeylen (n 115) 424.

[131] Francioni (n 119) 24 and Morgera, Tsioumani and Buck (n 13) 132.

[132] See the discussion in the previous section 2.2.2 of chapter two.

[133] Vermeylen (n 115) 424.

[134] Morten W. Tvedt, 'Beyond Nagoya: Towards a Legally Functional System of Access and Benefit sharing' in Sebastian Oberthür and G. Kristin Rosendal (eds), *Global Governance of Genetic Resources Access and Benefit Sharing after the Nagoya Protocol* (Routledge 2013) 161.

ownership of knowledge, for fully accommodating requests of IPLCs.[135] In a recent endeavour to normalise fair and equitable benefit-sharing in the context of international law, Morgera stresses the importance of international human rights law notions such as procedural fairness, non-discrimination and proportionality for interpreting "fair and equitable" standards as a way of realising the cross-fertilization between these two bodies of international law.[136] As this research focuses on IPLCs and their human rights, I will elaborate how a mutually supportive interpretation in light of relevant international human rights law may shed light on the standards of fair and equitable benefit-sharing with IPLCs in the following section 2.1. Nevertheless, I am aware the actual outcome would greatly depend on the process of establishing MAT and the articulation of private contractual terms in the ABS transactions.

1.4.2 Fair and equitable in Indigenous and local contexts

The standards of fair and equitable sharing of benefits in Indigenous and local contexts have been elaborated through recent COP decisions, in particular the 2016 Mo'otz Kuxtal Voluntary Guidelines.[137] In general, the Guidelines provide that the benefits received by IPLCs should be *fair and equitable* based on MAT.[138] Specifically, the Guidelines highlight that benefit-sharing should be fair and equitable at both inter-community and intra-community levels, "taking into account relevant community level procedures and as appropriate gender and age/intergenerational considerations".[139] Focusing on the capacity of IPLCs, the Guidelines also stress that, "Parties, other Governments, and others seeking access to TK should ensure that the holders of that TK *can* negotiate *on a fair and equitable basis*" when developing

[135] Vermeylen relies on the theory of distributive, procedural and interactional justice and points out IPLCs often have very different values and traditions but very weak and vulnerable social positions. See Vermeylen (n 115) 433.

[136] Morgera (n 9) 382.

[137] XIII/18 (n 68).

[138] ibid para 12.

[139] ibid paras 12-14.

MAT.[140] Furthermore, the importance of community protocols of ILCs is emphasised because they "may provide guidance from the *community perspective* on the fair and equitable sharing of benefits".[141] The role of MAT for securing fair and equitable and the importance of developing community protocols are also evident in earlier COP decisions.[142]

Thus the recent normative development under the ABS framework reflect the scholarly debates that fair and equitable standards should take into account IPLCs' perspectives and notions of fairness and equity. The COP decisions have emphasised on the customary laws and community protocols of IPLCs, as well as capacity-building measure in order to achieve this goal. This emerging consideration indicates that the standard of "fair and equitable" is not only "part and parcel of the object and purpose of the Protocol", but also fundamentally embedded in the procedural requirements of ABS, including capacity-building, MAT negotiation and the development of ILCs' community protocols.[143] In order to clarify the rights and duties of the legal key stakeholders (States, ILCs and private entities) involved in the benefit-sharing process, I focus on the human rights of equality and non-discrimination of IPLCs in the next section, as they may help to define "fair and equitable" more precisely in the CBD and the Nagoya Protocol specifically in Indigenous and local contexts.

---

[140] ibid para 23 (d).

[141] ibid para 23 (b).

[142] CBD COP Decision XI/1, 'Status of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization and related developments' (5 December 2012) UN Doc UNEP/CBD/COP/DEC/XI/1 anx II.

[143] CBD Subsidiary Body on Implementation, 'Study into Critera to Identify a Specialized International Access and Benefit-Sharing Instrument, and a Possible Process for its Recognition' (29 May 2018) UN Doc CBD/SBI/2/INF/17 para 23.

2. Human rights implication on benefit-sharing related provisions

The above analysis elaborated the points that ILCs are legitimate beneficiaries in ABS transactions concerning their GR and TK and that State Parties of the Nagoya Protocol are obliged to ensure the realisation of fair and equitable benefit-sharing at both inter-State and intra-State levels. Various means and procedural safeguards are envisaged under the CBD and the Nagoya Protocol to facilitate the realisation of this core ABS objective, for instance, based on the negotiated MAT, benefit-sharing can be achieved via technology transfer and funding. The normative standards of "fair and equitable" remain undefined yet they demand respect for ILCs' customary laws and community protocols. In the scholarly debate, benefit-sharing has been appraised in light of the discourse on justice. For example, Schroeder argues that fair and equitable benefit-sharing is a small but important step forward to redress distributive injustices.[144] Concerns about unjust treatment and social inequities are especially conspicuous in the context of exploitation and utilisation by non-owner of ILCs' GR and TK without fair and equitable benefit-sharing, as such resources and knowledge are closely related to ILCs general well-being.[145] There is also a growing attention on how to include and empower women in the decision-making process of benefit-sharing and in the distribution of shared benefits, demonstrating gender equity and equality as a concern central to the demand of social justice.[146] Nevertheless, as discussed, there persist many deficiencies and loopholes of the current benefit-sharing mechanism under the CBD and the Nagoya Protocol: from not enough focus or implementation on the "user-

[144] Doris Schroeder, 'Justice and Benefit Sharing' in Rachel Wynberg, Doris Schroeder and Roger Chennells (eds), *Indigenous Peoples, Consent and Benefit Sharing* (Springer 2009) 11.

[145] David Castle and E. Richard Gold, 'Traditional Knowledge and Benefit Sharing: From Compensation to Transaction' in Phillips. W.B. Peter and Chika B. Onwuekwe (eds), *Accessing and Sharing the Benefits of the Genomics Revolution* (2007) 65.

[146] See Fatima Alvarez-Castillo and Dafna Feinholz, 'Women In Developing Countries and Benefit Sharing' (2006) 6 (3) Developing World Bioethics, 114 and Gabriela Mata and Adel A. Sasvári, 'Integrating Gender Equality and Equity in Access and Benefit-sharing Governance: Through a Rights-based Approach' in Jessica Campese (ed), *Rights-based Approaches: Exploring Issues and Opportunities for Conservation* (CIFOR 2009) 258.

side measures"[147] to the lack of capacity of especially developing countries and ILCs to put ABS policies in place and monitor the utilisation of GR and TK.[148]

What, then, are the implications of human rights of IPLCs in the context of benefit-sharing? The 2018 report of the Special Rapporteur Saad Alfarargi on the right to development could offer a glimpse of how human rights norms may contribute to ensure fair and equitable benefit-sharing. Specifically, in addressing the inequality in economic, social, cultural and political development, he states that, States shall ensure "inclusive and meaningful participation of relevant stakeholders at all levels of decision-making" in order to enable and ensure "the equal sharing of benefits".[149] In fact, there is also an emerging trend in incorporating benefit-sharing in the international human rights standards to realise, for instance, IPLCs' rights to environment, equality and development.[150] For example, in April 2018, the UN Special Rapporteur on human rights and the environment John Knox proposes a series of framework principles relating to human rights and the environment, in which the Framework Principle 15 requires States to ensure that Indigenous peoples and members of traditional communities "fairly and equitably share the benefits from activities relating to their lands, territories or resources".[151]

---

[147] Morten W. Tvedt and Tomme R. Young, *Beyond Access: Exploring Implementation of the Fair and Equitable Sharing Commitment in the CBD* (IUCN 2007) 130.

[148] Bram D. Jonge, 'What is Fair and Equitable Benefit-sharing?' (2011) 24 (2) Journal of Agricultural and Environmental Ethics, 141 and Bram D. Jonge, 'Towards a Fair and Equitable ABS Regime: Is Nagoya Leading Us in the Right Direction?' (2013) 9 (2) Law, Environment and Development Journal, 249.

[149] Human Rights Council, 'Report of the Special Rapporteur on the Right to Development' (20 July 2018) UN Doc A/HRC/39/51 paras 20 and 66.

[150] Morgera (n 12) 13.

[151] Human Rights Council, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (24 January 2018) UN Doc A/HRC/37/59 18.

Indeed, widely recognised as the stewards of biodiversity and holders of TK, IPLCs have intrinsic rights and claims over their GR and TK, which requires a perspective that looks beyond the environmental framework of the CBD and the Nagoya Protocol to consider also ILCs' human rights, especially with respect to their land, resources and culture. [152] In this mind-set, this section examines the human rights to equality and non-discrimination, development, and property respectively, because they provide the most significant normative ground for theorising the concept, standards and procedures of fair and equitable benefit-sharing with respect to IPLCs. The ongoing development in the process of international law-making, jurisprudential interpretation by human rights courts and human rights treaty bodies, as well as scholarly debates offers ample legal sources for investigating the interaction between the ABS norms of fair and equitable benefit-sharing with international human rights standards, which remains an area extremely understudied.[153]

2.1 Right to equality and non-discrimination

Equality and non-discrimination are well-established international human rights, and together they constitute a basis for the protection of other fundamental human rights.[154] This principle prohibits any distinction, exclusion, restriction or preference that is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, or has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons of all rights and freedoms.[155] This right is grounded in the principle of equality that all

[152] Morgera, Tsioumani and Buck (n 13) 374 and Wiessner (n 13) 140.

[153] Elisa Morgera, 'Fair and Equitable Benefit-Sharing at the Cross-Roads of the Human Right to Science and International Biodiversity Law' (2015) 4 (4) Laws, 807.

[154] Every human rights instrument has a non-discrimination clause, see Rhona K. M. Smith, *International Human Rights Law* (Eighth edn, Oxford University Press 2018) 195 and HRC, 'CCPR General Comment No.18: Non-discrimination' (10 November 1989) UN Doc HRI/GEN/1/Rev.9 (Vol. I) para 1.

[155] HRC (n 154) para 7.

people are born "free and equal in dignity and rights", as enshrined in Article 1 of the Universal Declaration of Human Right.[156] While non-discrimination is commonly reckoned as a negative restatement of the principle of equality in the human rights realm, the positive dimension of equality requires States to take affirmative measures to ensure the realisation of equality among all people.[157] In addition to the general guarantees to the rights to equality and non-discrimination provided by the international human rights law, various instruments are also in place to address specific forms of discrimination in relation to particular individuals or groups, including children, older people, people with disabilities, minorities and Indigenous peoples.[158] The following analysis focuses on Indigenous peoples, minorities and women and their rights to equality and non-discrimination and examines the implications of their rights in the context of benefit-sharing as envisaged in the Nagoya Protocol.

The first section investigates the right to equality and non-discrimination of Indigenous peoples and minorities based on relevant provisions in human rights treaties and the works of human rights treaty bodies. The observation is that the right to equality and non-discrimination serves as a legal basis for claiming fair and equitable benefit-sharing from exploitative activities of their resources.[159] This right also offers a perspective of understanding fairness and equity in ABS negotiations at both inter-community and intra-community levels. The second section focuses on the issue of gender equality, based on the frequent yet largely overlooked reference to

---

[156] Universal Declaration of Human Rights [10 December 1948] UNGA Res 217 A (III), art 1.

[157] Natan Lerner, *Group Rights and Discrimination in International Law* (Second edn, Nijhoff 2003) 25 and HRC (n 154) para 10.

[158] For an overview of the legal system addressing human rights of equality and non-discrimination under the UN framework, see, Wouter Vandenhole, *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia 2005) 5. See also essays in Stephanie Farrior (ed), *Equality and Non-Discrimination under International Law* (Routledge 2017) 3.

[159] Jérémie Gilbert, *Natural Resources and Human Rights: An Appraisal* (First edn, Oxford University Press 2018) 77.

women in the Nagoya Protocol. I argue at the end of the analysis that the States' responsibility to ensure fair and equitable benefit-sharing must be underlined by their international human rights obligations to secure equality and non-discrimination of all individuals and peoples, especially IPLCs and women within these communities.

2.1.1 Indigenous peoples and minority groups

The principle of equality and non-discrimination lies at the core of international human rights law. It requires that the general human rights as set out in the Universal Declaration of Human Rights of 1948 and all the subsequent international human rights instruments to be equally enjoyed by everyone, including members of Indigenous peoples and minority groups.[160] In particular, the International Covenant on Civil and Political Rights (ICCPR) addresses the rights of persons belonging to minorities to enjoy their own culture, to profess and practice their own religion, or to use their own language.[161] Aiming at protecting a group from discrimination on grounds of race, the Committee on the Elimination of Racial Discrimination (CERD) has made it clear that discrimination against Indigenous peoples is to be considered as racial discrimination; therefore, covered by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[162] Furthermore, two human rights declarations focusing on discrimination regarding religion or belief and minorities—the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief[163] and the Declaration on the Rights of

[160] Isabelle Schulte-Tenckhoff, 'Treaties, Peoplehood, and Self-determination: Understanding the Language of Indigenous Rights' in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press 2012) 71.

[161] International Covenant on Civil and Political Rights [adopted 16 December 1966, entered into force 3 January 1976] 999 UNTS 171, art 27.

[162] CERD, 'CERD General Recommendation No. 23: Indigenous Peoples' (1997) UN Doc A/52/18 para 1.

[163] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief [25 November 1981] UNGA Res 36/55.

Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[164]–also provide protection of Indigenous peoples and minority groups against discrimination. For instance, the former Declaration guarantees to everyone the right to "have a religion or whatever beliefs of his choice, and freedom, either individually or in community with others…to manifest his religion or belief", which conspicuously covers ILCs' own worldviews, values and customary rules.[165]

These human rights instruments, albeit with varying degrees of binding force and recognition among States, provide a set of obligations and measures to ensure compliance.[166] According to Article 26 of the ICCPR, State Parties must "guarantee to all persons equal and effective protection against discrimination on any ground".[167] This means that States are obliged to effectively address instances of structural and systemic discrimination by taking positive measures.[168] Along the same lines, the ICERD envisages positive obligations to ensure development and protection of racial groups for the purpose of guaranteeing them the full and equal protection of human rights in economic, social and cultural fields.[169] In this context, the HRC has provided an example of what an affirmative action might contain:

---

[164] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities [18 December 1992] UNGA Res 47/135.

[165] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, art 1.

[166] At the time of writing, the CERD has 88 signatories and 180 parties, see UNTC, 'International Convention on the Elimination of All Forms of Racial Discrimination' (*UN Treaty Collection*, 1966) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en> accessed 11/05/2019. The two declarations are not treaties but general agreed by States as UN resolutions.

[167] ICCPR, art 26.

[168] Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2014) 701.

[169] International Convention on the Elimination of All Forms of Racial Discrimination [adopted 21 December 1965, entered into force 4 January 1969], arts 2 6 and 7.

> in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.[170]

Thus, under the general obligation to take positive measures, State Parties are also required to be observant of the special conditions and act in according to domestic and local circumstances in order to effectively correct discrimination.

Important linkages between this principle and benefit-sharing have been increasingly elaborated by the human rights treaties bodies including the CESCR, the CERD and the HRC. On the one hand, in the Concluding Observations provided by the CESCR and the CERD, the right to equality and non-discrimination have been constructed as a legal basis for asserting States' obligations to ensure benefit-sharing with IPLCs. For example, in light of the right to non-discrimination and the right to culture,[171] the CESCR observed that New Zealand had not given sufficient protection of the inalienable rights of Indigenous Māori people to their lands, territories, waters and maritime areas; therefore, urged the State Party to ensure that Māori receive proper compensation and enjoy tangible benefits from the exploitation of their resources.[172] Referring to its General Recommendation No. 23 on Indigenous peoples, the CERD stressed that merely consulting the communities prior to exploiting their subsoil

[170] HRC (n 154) para 10.

[171] International Covenant on Economic, Social and Cultural Rights [adopted 16 December 1966, entered into force 3 January 1976], arts 1(2) and 15.

[172] CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights of New Zealand' (31 May 2012) UN Doc E/C.12/NZL/CO/3 para 11.

resources is not enough, because PIC of these communities and the equitable sharing of benefits to be derived from such exploitation must be ensured.[173]

Under the jurisprudence of the HRC, the right to equality and non-discrimination plays an important role in securing IPLCs' right to culture both as a group and as individuals at different levels. Specifically, based on the recognition that the ability of a minority group to maintain its culture, language or religion is the precondition for realising Article 27, the HRC has suggested that State Parties shall take positive measures to protect not only the individuals' rights within the minorities, but also the identity of minority groups as a whole.[174] In this connection, the HRC highlights that "such positive measures must respect the provisions of Articles 2(1) and 26 of the Covenant both as regards the treatment *between different minorities* and the treatment *between the persons* belonging to them and the remaining part of the population".[175] Thus, by linking the minority rights with the right to equality and non-discrimination, the HRC has unpacked two important aspects that are often overlooked. That is, the tension related to equality does not only exist between societal minorities and the majorities, but also among IPLCs themselves as minority groups and within IPLCs among individual members of the group. In order words, State Parties must pay attention to equality and non-discrimination at both inter-community and intra-community levels when fulfilling their obligations to respect and protect minorities' right to culture. In practice, Sami people have attempted to claim violations of their rights to culture in combination with their right to non-discrimination to the HRC.[176] However, as demonstrated in the *Paadar v Finland* case, it seems rather difficult to

[173] CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Ecuador' (2 June 2003) UN Doc CERD/C/62/CO/2 para 16.

[174] HRC, 'CCPR General Comment No. 23: Article 27 (Rights of Minorities)' (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5 para 6(2).

[175] ibid para 6.2. Emphasis added.

[176] *Paadar v Finland* [5 June 2014] (HRC) UN Doc CCPR/C/110/D/2102/2011 para 2.15.

prove the discriminatory intention or effects to support such a claim.[177] It has to be noted that the inter-community equality is also relevant for communities whose identities are not recognised as "peoples" or "minorities". From a human rights perspective, their rights in connection with land, natural resources, culture and knowledge shall also be taken into account so that there is no inter-community discrimination at the domestic level.[178] At both inter-community and intra-community levels, discriminatory acts may be practised by different entities, including public authorities, communities, and private persons or bodies.[179]

2.1.2 Women and gender equality

Gender equality is emphasised in both International Covenants. Asserting the general principle of equality, the ICCPR obliges State Parties to ensure the equal right of men and women to the enjoyment of all civil and political rights[180] and the International Covenant on Economic, Social and Cultural Rights (ICESCR) addresses the equal right of men and women to the enjoyment of all economic, social and cultural rights.[181] The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is adopted in 1979 to address in particular discrimination against women, monitored by the Committee on the Elimination of Discrimination against Women (the CEDAW Committee).[182] Article 1 of the CEDAW describes "discrimination against women" as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or

[177] ibid paras 7.3 and 7.7.

[178] Olivier De Schutter, 'The Emerging Human Right to Land' (2010) 12 (3) International Community Law Review, 319 and Federico Lenzerini, *The Culturalization of Human Rights Law* (Oxford University Press 2014) 166.

[179] HRC, *CCPR General Comment No.18* (n 154) para 9.

[180] ICCPR, arts 2(2) and 3.

[181] ICESCR, art 3.

[182] Convention on the Elimination of All Forms of Discrimination against Women [adopted 18 December 1979, entered into force 3 September 1981] 1249 UNTS 13.

exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".[183] It is worth noting that the CEDAW explicitly addresses conduct attributable not only to State, but also to non-State actors.[184] To date, the CEDAW has almost universal recognition with 189 State Parties by ratification.[185]

The CEDAW Committee has rendered strong emphasis on the obligations of State Parties to take positive and affirmative measures to fulfil and facilitate the realisation of equality regarding women in its General Recommendations and Concluding Observations.[186] Three points are of particular relevance to inform benefit-sharing related obligations at the intra-State level. First, recognising that *de jure* equality is a prerequisite for achieving *de facto* equality of women, the CEDAW Committee has stressed the importance of the elimination of discriminatory legislation.[187] With respect to domestic legal frameworks, the CEDAW Committee notes that State Parties are obliged to make legislative efforts to establish and strengthen the principle of equality of all persons before the law in their domestic constitutions and legal systems.[188] As recommended by the CEDAW Committee,

---

[183] ibid art 1.

[184] Philip Alston and Ryan Goodman, *International Human Rights: The Successor to International Human Rights in Context* (Oxford University Press 2013) 191.

[185] The United States and Palau have signed, but not ratified the treaty. The Holy See, Iran, Somalia, Sudan, and Tonga are not signatories to CEDAW. See OHCHR, 'Status of Ratification' <http://indicators.ohchr.org/> accessed 11/06/2019.

[186] Alston and Goodman (n 184) 271.

[187] For a detailed analysis about the recommendations addressing discriminatory legislation issued by the CEDAW Committee, see Vandenhole (n 158) 240.

[188] See CEDAW, 'CEDAW General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention' (16 December 2010) UN Doc CEDAW/C/GC/28, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women of Guatemala' (12 February 2009) UN Doc CEDAW/C/GUA/CO/7 para 12 and CEDAW, 'Concluding Observations on the Fifth Periodic Report of Singapore' (21 November 2017) UN Doc CEDAW/C/SGP/CO/5 para 10.

these may include: A) to adopt a comprehensive definition of discrimination against women and girls and to ensure that that legislation covers all prohibited grounds of discrimination; B) to review its legislation, and if needed, to repeal any provisions that discriminate against women in order to ensure domestic legal compliance with the CEDAW; C) to raise public awareness about women's rights.[189] Second, in the context of economic and social benefits and economic empowerment of women, the CEDAW Committee has addressed the issues about, *inter alia*, the inadequate management of development processes, the lack of a coherent policy on social protection and compensation programmes for women, and the barriers that women face in accessing financial services.[190] It recommends that State Parties to "take measures to improve the economic empowerment of women, in particular among Indigenous women…and establish adequate mechanisms for monitoring, evaluation and impact analysis of social development programmes directed at women and ensure the participation of women".[191] In relation to the 2030 Agenda for Sustainable Development, the CEDAW Committee calls for the realisation of "substantive gender equality", in accordance with the provisions of the Convention.[192]

The scholarly discussion about women's rights vis-à-vis group rights also merits attention, in particular at the intra-community level where the concern of gender equality might clash with the one of community's cultural tradition.[193] Addressing the tension between multiculturalism and feminism, Okin argues that "defenders of

[189] CEDAW, 'Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Guatemala*' (22 November 2017) UN Doc CEDAW/C/GTM/CO/8-9 para 11.

[190] ibid para 38.

[191] ibid para 39.

[192] CEDAW, 'Concluding Observations on the Eighth Periodic Report of Kenya' (22 November 2017) UN Doc CEDAW/C/KEN/CO/8 para 54 and CEDAW, *Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Guatemala** (n 189) para 51.

[193] Examples of cultural practices that violate women's rights include, inter alia, female genital mutilation, family violence again women, forced marriages, restriction of access to the public sphere, see CEDAW, 'CEDAW General Recommendation No. 19: Violence against Women' (1992) UN Doc A/47/38 paras 11 and 20.

cultural and groups rights for minority culture have failed to notice that there are considerable differences of power within those cultures, and that those differences are gendered, with men having power over women".[194] Based on this observation, Okin has suggested that gender equality must be reckoned as a non-negotiable condition for any policies of multiculturalism and any recognition of minority rights[195] and that "when liberal arguments are being made for the rights of groups, special care must be taken to look at intra-community inequalities".[196] In response to Okin's criticism, Kymlicka clarifies that the literal idea of multiculturalism does not tolerate "internal restrictions" on members of minority groups—as these violate the autonomy of individuals and create injustice within the group—and further recognised the right to gender equality as a limiting condition of minority rights.[197] This line of thought provides that gender equality is a principle underlining the scope and content of group rights, especially in connection with certain cultural practices of the group that might undermine women' rights. Admittedly, Okin's arguments, in particular about how the tension between women's rights and group rights could be diffused, is not without controversy.[198] To pursue further in this debate is outwith the scope of this section.[199]

---

[194] Susan Moller Okin, *Is Multiculturalism Bad for Women?* (Princeton University Press 1999) 27 and Susan Moller Okin, 'Feminism and Multiculturalism: Some Tensions' (1998) 108 (4) Ethics, 664.

[195] Okin, 'Feminism and Multiculturalism: Some Tensions' (n 194) 664.

[196] She also pointed out that it is especially important to look at inequalities between the sexes, since they are likely to be in many respects less public; therefore, less immediately apparent and harder to discern than others, see ibid 683.

[197] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon 1995) 35.

[198] It has been suggested that measures like political dialogue or a more gender-sensitive process that aims for the empowerment of women might be more capable of addressing the tension. See Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press 2001) 118 and Bhikhu C. Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Second edn, Palgrave Macmillan 2006) 193.

[199] I discuss this point as a potential avenue for future work in section 2 of chapter five.

The key message, nevertheless, is that the issue of gender equality is not only relevant to benefit-sharing at the intra-State level but also at the intra-community level.[200]

Women, especially women from ILCs, and their role in ABS have been addressed six times in the Nagoya Protocol, but attracted little scholarly attention. The Preamble of the Nagoya Protocol recognises the "vital role" that women play in the ABS processes and affirms the need for the "full participation of women at all levels of policy-making and implementation for biodiversity conservation".[201] With respect to TK associated with GR, the Protocol requires Parties to support ILCs, "including women within these communities" to develop community protocols, minimum requirements for MAT and model contractual clauses for benefit-sharing. Furthermore, in the context of capacity-building,[202] Parties are required to support the capacity needs and priorities of ILCs and relevant stakeholders, while "emphasizing the capacity needs and priorities of women".[203] The Protocol also provides possible measures for capacity-building that may include special measures to increase the capacity of ILCs with "emphasis on enhancing the capacity of women within those communities".[204] At the inter-State level, the COP-MOP of the Nagoya Protocol is obliged to take into account the capacity needs and priorities of ILCs, including women within these communities, when providing guidance with respect to the financial mechanism.[205] These provisions reflect the importance of recognising and respecting the needs, priorities and right of women when implementing the Nagoya Protocol, and arguably,

[200] See also the discussion in the previous section 2.3 in chapter two about how IPLCs' customary laws may conflicts with fundamental human rights standards for women and other vulnerable persons within IPLCs.

[201] Nagoya Protocol, pmbl.

[202] See the discussion in the previous section 1.3.1.

[203] Nagoya Protocol art 22(3).

[204] ibid art 22(5)(j).

[205] ibid art 25 (3).

also imply the fact that women within ILCs are not always included in the decision-making process.

Thus, it can be observed that the issue of gender equality, especially the protection of the rights of women from ILCs, has been taken into account by the Nagoya Protocol. However, it has not attracted much attention among Parties or scholarly literature in relation to how ABS obligations could be fulfilled in a way that is in line with the international human rights standards on women's rights. No substantive or procedural safeguards are in place for protecting women within IPLCs in the process of ABS negotiations and implementations. Against this background, international human rights standards for protecting women's rights may contribute to articulate provisions in the Nagoya Protocol vis-à-vis women within IPLCs. A mutually supportive understanding is explained in detail in the next section.

2.1.3 Human rights implications

The right to equality and non-discrimination underlines the international human rights framework.[206] All above-examined human rights conventions against discrimination boasted high numbers of ratifications and bear "strong moral force of virtually universality".[207] In general, the human rights to equality and non-discrimination may serve to clarify the rights and obligations related to the intra-State dimension of fair and equitable benefit-sharing, including at inter-community and intra-community levels that remain extremely under-studied. This clarification may in turn contribute to contextualising the fairness and equity standards, (especially in terms of their implication and relevance towards IPLCs and women within these communities)

[206] Smith (n 154) 206.

[207] UN Secretary-General, 'Report of the Secretary-General on the implementation of the Programme of Action for the Second Decade to Combat Racism and Racial Discrimination' (16 September 1987) UN Doc A/42/493 10.

which remain a multi-dimensional international law concept[208] with a focus on IPLCs and women within these communities. The procedural dimensions of justice (fairness) and substantive dimensions (equity) [209] may be clarified by integrating substantive human right to equality and non-discrimination and its procedural elements.

Specifically, there are three relevant human rights implications. First, from a normative perspective, the ABS concept of fairness and equity are akin to equality and non-discrimination in human rights law, [210] in the sense that every individual and IPLCs shall be accorded with equal rights, equal opportunities and procedural safeguards in order to enjoy the optimal benefits from the ABS transactions. This requires State Parties of the Nagoya Protocol to eliminate discriminatory measures of any kind and take positive actions to address factual inequality when developing domestic legislative, administrative or policy measures. It also requires Parties to develop national ABS framework that envisages a level playing field for all stakeholders based on the principle of equality, taking the specific needs and situations of IPLCs into account. This could include providing extra resources and funds to support IPLCs' capacity in participating in the ABS processes.

Second, as observed in the previous section 1.3.1, the obligations of State Parties with respect to benefit-sharing exist at both inter-State and intra-State levels. At the intra-State level, all stakeholders including State Parties, non-State actors and IPLCs themselves bear duties to ensure fair and equitable benefit-sharing. This observation can be supported by the human rights concern related to equality, which

[208] Morgera observes that fair and equitable benefit-sharing presents in international environmental law, international human rights law, and international law of the sea and international health law, see Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (n 9) 353.

[209] Implementation (n 143) para 23.

[210] Katerina Tomasevski, 'Women's Rights' in Janusz Symonides (ed), *Human Rights: Concept and Standard* (Ashgate 2000) 242.

also exists at several levels—between minority and majority groups, among IPLCs as Indigenous and minority groups and within IPLCs among individual members of the group. In this connection, the human rights obligations of State Parties to address equality and non-discrimination at these inter-community and intra-community levels may shed light on the normative gap in the ABS framework, where the duties of State Parties to ensure intra-State fair and equitable benefit-sharing remain implicit.[211] That is, State Parties of the Nagoya Protocol need to take into account factors that might affect intra-community and inter-community equality when sharing benefit with its IPLCs or facilitating in the benefit-sharing process negotiated between private entities and IPLCs. From a practical perspective, States' obligations to take positive measures to ensure equal opportunities to eliminate discrimination may include fair and equitable benefit-sharing measures, in particular via capacity-building of IPLCs in order to empower their ability to fully enjoy their fundamental human rights. In this sense, the fulfilment of State Parties' obligations under the Nagoya Protocol may assist the fulfilment of their human rights obligations.

Last but not least, a sharpened focus on women unravels the rights and obligations relevant to intra-community benefit-sharing and its fair and equitable standards. To look at the provisions about women in the Nagoya Protocol through the lens of international human rights, I argue that State Parties' obligation to take legislative, administrative and policy measures to implement ABS must be underlined by their human rights obligations to incorporate the principle of equality of all persons, especially women's right to equality and non-discrimination. This means that when developing domestic ABS legal frameworks, State Parties shall endeavour to ensure *de jure* equality and prevent any policy of IPLC's rights that might have adverse impacts on women's rights. It also calls for special attention on women's full participation in the process of developing community protocols, MAT and contractual

[211] Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (n 9) 355.

clauses, which should reflect the needs and priorities of women themselves. Perceiving women' rights to non-discrimination and equality as part and parcel of the IPLCs' ABS rights may offer an opportunity to redress gender inequality within IPLCs and empower women in the local economic processes with respect to GR and TK. This would be in particular meaningful in situations where gender inequality is embodied in traditional practices or customs of some IPLCs and where women are in a more vulnerable position in the community.[212]

2.2 Right to development

The right to development has proved to be controversial since its initial appearance on the international stage in the 1970s.[213] Among extensive scholarly writing on the subject, opponents have questioned the normative grounds, nature, content and the usefulness of having a human right to development.[214] Meanwhile, without eschewing the many deficiencies of the right, proponents have advocated for attention and efforts to enable the notion in a way that could influence the behaviour of States to respect fundamental human rights [215] and to endorse a rights-based approach to development[216]–if not to recognise the right to development *per se* as a legally binding

[212] For example, *Sandra Lovelace v Canada* [30 July 1981] (HRC) UN Doc. CCPR/C/13/D/24/1977 166.

[213] For an analysis of the history of the right to development at the UN level, see Russel Barsh, 'The Right to Development as a Human Right: Results of the Global Consultation' (1991) 13 (3) Human Rights Quarterly, 322 and Stephen Marks, 'The Human Right to Development: Between Rhetoric and Reality' (2004) 17 Harvard Human Rights Journal, 138.

[214] See Jack Donnelly, 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development' (1985) 15 (3) California Western International Law Journal, 478 and Arne Vandenbogaerde, 'The Right to Development in International Human Rights Law: A Call for its Dissolution' (2013) 31 (2) Netherlands Quarterly of Human Rights, 188.

[215] Philip Alston, 'Making Space for New Human Rights: The Case of the Right to Development' (1988) 1 Harvard Human Rights Yearbook, 7.

[216] Stephen P. Marks, 'The Human Rights Framework for Development: Seven Approaches' in Arjun Sengupta, Archna Negi and Moushumi Basu (eds), *Reflections on the Right to Development* (SAGE 2005) 27.

norm.[217] Despite the fact that the right to development still faces a significant lack of conceptual clarity, it has been increasingly accepted by the international community and explicitly established in several international instruments. Specifically, the right to development is formally recognised as an international human right when the UN General Assembly adopted the Declaration on the Right to Development (DRD) in 1986. [218] Although the DRD is not legally-binding, it indeed receives a full international consensus; therefore, arguably represents customary international law.[219] The Preamble of the DRD states, "development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the *fair distribution of benefits resulting therefrom*".[220] The right to development is also recognised in the African Charter on Human and Peoples' Rights for both individuals and groups.[221] The 1992 Rio Declaration incorporates the right to development as one of its 27 principles, so as to "equitably meet developmental and environmental needs of present and future generations". [222] The 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) addresses the historic injustices suffered by Indigenous peoples that prevented them from exercising "their right to development in accordance with their own needs and interests" in the Preamble. Article 23 of the UNDRIP elaborates,

[217] Sengupta has pointed out that a right-based process of development is not the same as the right to development, see Arjun K. Sengupta, 'The Human Right to Development' (2004) 32 (2) Oxford Development Studies, 181. For argument supporting the binding nature of the right, see Noel G. Villaroman, 'The Right to Development: Exploring the Legal Basis of a Supernorm' (2010) 22 (2) Florida Journal of International Law, 299.

[218] Declaration on the Right to Development [4 December 1986] UNGA Res A/RES/41/128.

[219] The DRD has received a full international consensus in 1993, see Sengupta (n 217) 180.

[220] DRD, pmbl.

[221] African Charter on Human and Peoples' Rights [adopted 27 June 1981, entered into force 21 October 1986] 1520 UNTS 217, art 22.

[222] Rio Declaration, Principle 3.

"Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development".[223]

At the UN level, a Special Rapporteur on the right to development was appointed in September 2016.[224] In his 2018 report, Saad Alfarargi notes, "inequality threatens long-term social and economic development and has an impact on the ability of individuals and communities to participate in, contribute to and enjoy economic, social, cultural and political development…within and across countries."[225] He suggests an "inclusive and meaningful participation of relevant stakeholders at all levels of decision-making" in order to enable and ensure "the equal sharing of benefits", which imposes obligations upon States.[226] Furthermore, the linkages between the right to development and benefit-sharing as well as their roles in achieving over-arching global goals, for instance, sustainable development, are also increasingly addressed. For instance, in its 2018 report on the right to development, the Office of the United Nations High Commissioner for Human Rights (OHCHR) stresses that, in implementing the 2030 Development Agenda and the Sustainable Development Goals, States should promote fair and equitable distribution of the benefits resulting from development, globalization and global commons.[227] The Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples has also recommended that, in order to guarantee the human rights of Indigenous peoples in

[223] United Nations Declaration on the Rights of Indigenous Peoples [13 December 2007] UNGA Res 61/295, art 23.

[224] Human Rights Council, 'The Right to Development' (27 September 2016) UN Doc A/HRC/33/L.29 para 14.

[225] Council, *Report of the Special Rapporteur on the Right to Development* (n 149) para 20.

[226] ibid para 66.

[227] Human Rights Council, 'Report of the Secretary-General and the United Nations High Commissioner for Human Right: Right to development' (10 July 2018) UN Doc A/HRC/39/18 para 63(n).

relation to major development projects, States should "ensure mutually acceptable benefit sharing".[228]

Behind the discussion of the right to development, it is the North-South divide of the countries in the world of their capacities in sharing equally in the decision-making privileges as well as the distribution of the benefits.[229] Admittedly, the international community has not been able to negotiate a binding instrument for the right to development after nearly 30 years' debate. However, the core components of the right and their implications have been enunciated through the extensive literature, case law[230] and the work completed at the UN level. Meanwhile, the right is increasingly integrated into and connected with many other fundamental human rights, notably the social, cultural and economic human rights and the rights of Indigenous peoples.[231] In the context of natural resource governance, Gilbert observes that the right to development has become "an important anchor" to support the right of ILCs to participation as well as to benefit from natural resources exploitation.[232] The principle of benefit-sharing is also increasingly recognised as an important procedural dimension of the somewhat "elusive and paradigmatic" right to development.[233] These articulations pave the way to investigate the interaction between the ABS principle of fair and equitable benefit-sharing with international human rights standards, which

---

[228] Commission on Human Rights, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People' (21 January 2003) UN Doc E/CN.4/2003/90 para 66.

[229] Arjun K. Sengupta, 'Conceptualizing the Right to Development for the Twenty-first Century' in, *Realizing the Right to Development* (UN Publication 2013) 69.

[230] For instance, *Case of the Saramaka People v Suriname* [28 November 2007] (Inter-American Court of Human Rights) IACHR Series C no 172 and *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* [2010] (ACHPR) 276/2003.

[231] HRC, 'Agenda and Annotations' (3 August 2018) UN Doc A/HRC/39/1 and Human Rights Council, 'Report of the United Nations High Commissioner for Human Rights on the Rights of Indigenous Peoples' (6 July 2018) UN Doc A/HRC/39/37.

[232] Gilbert, *Natural Resources and Human Rights: An Appraisal* (n 159) 63.

[233] See Vandenbogaerde (n 214) 187 and Gilbert, *Natural Resources and Human Rights: An Appraisal* (n 159) 64.

remains an area extremely understudied.[234] The following paragraphs thus focus on the benefit-sharing dimension as embedded in the right to development via the *Endorois* case ruled by the African Commission on Human and People's Rights (the Commission) in 2010,[235] and explore its interaction with the fair and equitable benefit-sharing as established under the Nagoya Protocol.

The case concerns the displacement of the Endorois communities from their ancestral lands by the Kenyan government in the 1970s and the subsequent disruption of the community's pastoralist way of life. In this case, the Commission found that the Kenyan government had violated the Endorois' rights to religious practice, to property, to culture, to free disposition of natural resources and to development.[236] Regarding the right to development, the Commission recalls the *Saramaka* case,[237] in which benefit-sharing has been considered vital both in relation to the right to development and by extension to the right to own property.[238] In the view of the Commission, benefit-sharing is key to the development process and the Endorois community are entitled to "reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival".[239] The Commission highlights States' obligations to "ensure mutually acceptable benefit sharing" and suggested that it could be implemented in a form of "reasonable equitable compensation".[240] Further stressing States' obligation to "ensure that the Endorois are not left out of the development process or benefits", the Commission concludes that since the Kenyan

[234] Morgera, 'Fair and Equitable Benefit-Sharing at the Cross-Roads of the Human Right to Science and International Biodiversity Law' (n 153) 807.

[235] *Endorois Case* (n 230) paras 294-298.

[236] ibid para 294-298.

[237] *Case of the Saramaka People v Suriname* (n 230).

[238] *Endorois Case* (n 230) paras 294-298.

[239] ibid.

[240] ibid para 296.

Government had failed to provide adequate compensation or benefits thus "did not adequately provide for the Endorois in the development process", the Endorois community had suffered a violation of their right to development as enshrined in Article 22 of the African Charter on Human and Peoples' Rights.[241]

This case demonstrates that States should abide by their human rights obligations in the domestic development process, which include providing for an adequate, inclusive, equitable and mutually agreed process of benefit-sharing. Thus, the right to development can be perceived as one possible avenue where international human rights could accommodate concerns of IPLCs in the development processes that are based on their resources and knowledge, including the utilisation of their GR and TK as defined under the Nagoya Protocol. To elaborate the obligations of States in the context of the right to development, it is important to note that there are arguably an internal and an external aspect of the right.[242] The internal aspect relates to the obligation of State to ensure the domestic realisation of the right to development, for instance, the rights of IPLCs who live within States' territories, while the external aspect implies the obligation of *all* States to cooperate in order to ensure the right to development of all individuals and peoples around the globe.[243] The internal aspect also connects to the collective characteristic of the right as recognised in the UNDRIP for Indigenous peoples. Thus, designed to benefit all individuals and peoples from the

[241] African Charter on Human and Peoples' Rights, art 22.

[242] Koen D. Feyter, 'Towards A Multi-Stakeholder Agreement on the Right to Development' in Stephen P. Marks (ed), *Implementing the Right to Development: the Role of International Law* (Friedrich-Ebert-Stiftung 2008) 98.

[243] See Dinah Shelton, 'A response to Donnelly and Alston' (1985) 15 (3) California Western International Law Journal, 527 and Margot E. Salomon, 'Legal Cosmopolitanism and the Normative Contribution of the Right to Development' (2008) LSE Law, Society and Economy Working Papers 16/2008, 11.

development process, the right to development requires international recognition, cooperation and implementation in a holistic and interconnected manner.[244]

Thus, it is reasonable to conclude that the principle of equitable distribution of the benefits of development as enshrined in the DRD echoes the objective of fair and equitable benefit-sharing established under the CBD and its Nagoya Protocol. Both reflect the concern about the inequalities embedded in the world's development process and the significant power asymmetries among States, IPLCs and other non-State actors. Although the right to development remains controversial, the elaboration of its core components, characteristics and relationship with other fundamental human rights have proved to be significant over the past three decades. In particular, the principle of benefit-sharing—an important procedural dimension of the right to development—demonstrates that the States are obliged to provide for an adequate, inclusive, equitable and mutually agreed process of benefit-sharing in the domestic development process. Recalling the analysis provided in the previous section 1.3.1, the right to development and the correlated obligations confirm that fair and equitable benefit-sharing is obligatory under the Nagoya Protocol. The detailed requirements put forward by the African Commission in the *Endorois* case that benefit-sharing should be "adequate, inclusive, equitable and mutually-agreed" also could inform domestic legislators and all stakeholders of ABS of what a benefit-sharing process should entail, if it is to be carried out in line with international human rights standards. Furthermore, the external aspect of the right to development may also be linked to Parties' obligation to international cooperation in order to ensure fair and equitable benefit-sharing and to promote capacity-building of the IPLCs under the Nagoya Protocol. That is, States bear not only domestic obligations to ensure IPLCs under its jurisdiction to enjoy fully their right to development via benefit-sharing, but also IPLCs and provider countries

[244] Roland Rich, 'The Right to Development as an Emerging Human Right' (1983) 23 (2) Virginia Journal of International Law, 288.

around the globe. Last but not least, the detailed list of both monetary and non-monetary benefits as well as the procedural requirements including MAT and PIC, as provided in the Nagoya Protocol, could complement the realisation of the human rights to development by providing a toolkit for negotiating and implementing benefit-sharing terms that could go well beyond just an adequate compensation.

2.3 Property rights to lands, territories, natural resources and knowledge

The international human rights instruments contain an explicit right to the protection of property, starting with the Universal Declaration of Human Rights, which states that "everyone has the right to own property alone as well as in association with others" and that "no one shall be arbitrarily deprived of his property".[245] This right has also been recognised in the key regional human rights instruments, including the European Convention,[246] the American Convention[247] and the African Charter.[248] The fact that more than two third of the States has accepted the jurisdiction of a regional human rights court makes claims of property right a rather powerful one.[249] Indeed, over the past two decades, the international and regional courts and tribunals have witnessed a growing body of jurisprudence of the right to property, especially with respect to Indigenous peoples and communities.[250] However, there is significant analytical and practical distinction in terms of how the right to property is framed in domestic

[245] UDHR art 17.

[246] Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms [adopted 20 March 1952, entered into force 3 September 1952] 213 UNTS 262, art 1.

[247] American Convention on Human Rights, "Pact of San Jose", Costa Rica [adopted 22 November 1969, entered into force 18 July 1978] 1144 UNTS 123, art 21.

[248] African Charter on Human and Peoples' Rights, art 14.

[249] José E. Alvarez, 'Property Rights as Human Rights' in Jahel Queralt and Bas van der Vossen (eds), *Economic Liberties and Human Rights* (Taylor & Francis 2019) 17.

[250] For a review of international and regional human rights case law concerning property right, see P. van Der Molen, 'Property, Human Rights Law and Land Surveyors' (2016) 48 (346) Survey Review 52.

contexts, for instance, in the process of developing land ownership policies.[251] In scholarly discussion, whether the right to property could be regarded as a fundamental human right *per se* remains a controversial issue.[252] However, it has been commonly agreed that the realisation of many fundamental human rights, such as the right to life and to food, would be impossible without the protection of the right to property.[253]

For Indigenous peoples, the idea of securing rights of a proprietary nature is underlined by the fundamental right of self-determination, which requires that "in no case may a people be deprived of its own means of subsistence".[254] This connection is based on the recognition of the interdependence between Indigenous peoples and their lands and resources, in the sense that they typically rely on their "communal stewardship" over land and natural resources to ensure their economic, social and cultural viability and development.[255] The same connection also exists in many local

[251] Stefano Moroni, 'Property as a Human Right and Property as a Special Title' (2018) 70 Land Use Policy 278.

[252] For instance, Lillich has argued that property rights cannot fit into the category of fundamental human rights because they may be adopted in domestic contexts in various forms whereas fundamental human rights do not foresee the same level of State discretion—fundamental human rights norms that prohibit genocide, torture and slavery, for instance, are non-negotiable. See, Richard B. Lillich, 'Civil Rights' in Theodor Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (Clarendon 1984) 157 and Anthony A. D'Amato, *International Law: Process and Prospect* (Second edn, Transnational Publishers 1995) ch 6. In contrast, legal philosophers such as Rothbard and Malloy have equated human rights to property rights based on the application of economic theory to law and social policy—that it is good for both individual dignity and economic growth to not have a solid boarder between property rights and human rights. See Robin Malloy, 'Equating Human Rights and Property Rights - The Need for Moral Judgment in an Economic Analysis of Law and Social Policy' (1986) 47 (1) Ohio State Law Journal 165 and Murray N. Rothbard, *The Ethics of Liberty* (Second edn, New York University Press 1998) 113.

[253] Henry G. Schermers, 'The International Protection of the Right of Property' in Franz Matscher, Herbert Petzold and Gérard J. Wiarda (eds), *Protecting Human Rights: the European Dimension* (C. Heymanns Verlag 1988) 565. and Susan Randolph and Shareen Hertel, 'The Right to Food: A Global Perspective' in Lanse Minkler (ed), *The State of Economic and Social Human Rights: A Global Overview* (Cambridge University Press 2010) 21 Jérémie Gilbert, 'Land Rights as Human Rights: the Case for a Specific Right to Land' (2013) 10 (18) International Journal of Human Rights 117.

[254] ICCPR, art 1(2) and ICESCR, art 1(2).

[255] See Sub-Commission on the Promotion and Protection of Human Rights, 'Indigenous Peoples and their Relationship to Land--Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes' (11 June

contexts as properties including lands and natural resources often provide sustentive means for local communities to maintain and develop their traditional ways of life.[256] A growing debate that is relevant to IPLCs is the discussion about the right of intangible properties, or "intellectual property rights" (IPRs), over the intellectual creations of IPLCs, such as their TK associated with GR.[257] Acknowledging the potential conflicts between the protection of IPRs and other human rights norms;[258] it is generally agreed that human rights to property should inform the shaping and interpretation of IPRs rules, which include the protection of TK as enshrined in Article 31 of the UNDRIP.[259] This issue of protecting TK of IPLCs is also discussed at various international fora including human rights, the CBD and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreements under the WTO, where the work of elaborating the scope and procedures of TK protection is still ongoing. Another closely related right is the right of non-discrimination as discussed in the previous section 2.1. As IPLCs often possess a different system of modalities and ownership of property,

---

2001) UN Doc E/CN.4/Sub.2/2001/21 7, S. James Anaya, *Indigenous Peoples in International Law* (Second edn, Oxford University Press 2004) 141. and Gilbert, *Natural Resources and Human Rights: An Appraisal* (n 159) 34.

[256] van Der Molen (n 250) 57.

[257] Erica-Irene Daes, 'Intellectual Property and Indigenous Peoples' (2001) 95 Proceedings of the Annual Meeting (American Society of International Law), 143, Rosemary J. Coombe, 'Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity' (1998) 6 (1) Indiana journal of global legal studies, 59 and Rosemary J. Coombe, 'Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Right or Claims to an Alternative Form of Sustainable Development?' (2005) 17 Florida Journal of International Law, 115.

[258] For instance, the Sub-Commission on the Promotion and Protection of Human Rights reckons that "actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights", see Rights, *Intellectual Property Rights and Human Rights* (n 88). See also Audrey R. Chapman, 'The Human Rights Implications of Intellectual Property Protection' (2002) 5 (4) Journal of International Economic Law, 861.

[259] Robert L. Jr Ostergard, 'Intellectual Property: A Universal Human Right?' (1999) 21 (1) Human Rights Quarterly, 21, Laurence R. Helfer, 'Human Rights and Intellectual Property: Conflict or Co-Existence?' (2004) 22 (2) Netherlands Quarterly of Human Rights, 167; Thomas Cottier, *Copyright and The Human Right to Property: A European and International Case Law Approach* (2018) 117.

the principle of non-discrimination also requires that their traditional and customary norms of property to be equally recognised, instead of marginalised or subdued under the domestic legal systems.[260]

With a sharpened focus on IPLCs and their human rights, this section investigates the property rights of IPLCs and asks how they are substantiated and what relationship they have with IPLCs' ABS rights as established under the Nagoya Protocol. I first visit the international human right instruments, in particular the Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries adopted under the International Labour Organization (ILO Convention 169) [261] and the UNDRIP, and summarise relevant provisions on the rights of IPLCs pertaining to land, territories, natural resources and TK. Then an expansive jurisprudential and scholarly interpretation of these rights are examined, based on human rights case laws as well as the work of the UN human rights treaties bodies. The final section provides conclusion on the human rights implications for the Nagoya Protocol with respect to benefit-sharing with IPLCs.

2.3.1 International human rights instruments

The ILO Convention 169 addresses the land rights of Indigenous and tribal peoples in a distinctive Part II through seven Articles. A broad understanding of "land" is adopted, including "the concept of territories" and covering "the total environment of the areas which the peoples concerned occupy or otherwise use".[262] In particular, Article 13 requires State governments to respect "the cultures and spiritual values" of the Indigenous peoples in relationship with their lands or territories, "in particular the

[260] Rights, *Study on Indigenous Peoples and their Relationship to Land* (n 255) 10.

[261] Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries [adopted 27 June 1989, entered into force 5 September 1991] ILO C169.

[262] ibid art 13(2).

collective aspects of this relationship".[263] Article 14 states that "the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised" and the right to use lands that are not exclusively owned or possessed shall also be appropriately safeguarded.[264] In this connection, State governments are obliged to identify these lands, guarantee effective protection to their property rights and provide procedures for dispute settlement.[265] Furthermore, the Convention addresses the rights of Indigenous peoples to the natural resources pertaining to their lands, including the right to "participate in the use, management and conservation of these resources".[266] In cases where the State retains the ownership of resources pertaining to lands, the Convention mandates States to consult with the concerned Indigenous peoples about any exploration or exploitation program and ensure that they participate in the benefits of such activities and receive fair compensation from any potential damages.[267] Part II of the Convention 169 further adds on the rights and conditions of Indigenous people to relocation, transmission of land rights and penalties in cases of violation of land rights.[268] Overall, Anaya suggests that the ILO Convention 169 provides an example of the legal development in contemporary international law, where modern notions of cultural integrity, non-discrimination, and self-determination join property precepts in the affirmation of *sui generis* Indigenous land and resources rights.[269] Significantly, the property rights envisaged in this instrument encompass Indigenous cultures, customs and

[263] ibid art 13 (1).

[264] Particular attention was called for nomadic peoples and shifting cultivators, ibid art 14(1).

[265] ibid arts 14(2)(3).

[266] ibid art 15 (1).

[267] ibid art 15 (2).

[268] ibid arts 16 17 18 and 19.

[269] Anaya (n 255) 142.

worldviews[270] and underlines the procedural requirements of FPIC, participation and benefit-sharing.[271]

The UNDRIP, adopted in 2007, is another important international human rights instrument that explicitly recognises property rights to land and resources of Indigenous peoples. In line with the ILO Convention 169, Article 25 of the UNDRIP frames Indigenous land rights in light of their "distinctive spiritual relationship" with their lands, territories, waters and resources.[272] It recognises Indigenous peoples' right to own, use, develop and control the lands, territories and resources,[273] as well as the right to redress and restitution for the lands they have lost without FPIC.[274] Notably, Article 31 states that "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions…they also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions".[275] Accordingly, States are obliged to "take effective measures to recognize and protect the exercise of these rights".[276] Thus, the property right to TK of Indigenous peoples is explicitly recognised in the UNDRIP. Admittedly, the UNDRIP does not spell out the right to benefit-sharing of Indigenous peoples. However, as will be demonstrated below, an expansive jurisprudential interpretation of Indigenous peoples' human rights to land, territories and resources has indicated

[270] See Lee Swepston, 'A new step in the international law on indigenous and tribal peoples: ILO convention No. 169 of 1989' (1990) 15 (3) Oklahoma City University Law Review, 698 and Ellen Desmet, *Indigenous Rights Entwined with Nature Conservation* (Intersentia 2011) 88.

[271] Morgera (n 12) 9.

[272] UNDRIP, art 25.

[273] ibid art 26.

[274] ibid art 28.

[275] ibid art 31 (1).

[276] ibid art 31 (2).

that benefit-sharing is indeed embedded in the substantive property right pertaining to land and resources.[277]

2.3.2 Jurisprudential and scholarly interpretation

An expansive jurisprudential interpretation of the human right to property in an Indigenous context can be observed in the rulings of regional human rights tribunals and the works of UN human rights treaty bodies. The following paragraphs investigate the property right of Indigenous peoples to land and resources and to TK respectively. The property right to land and resources is analysed through the case law of the Inter-American Court of Human Rights (Inter-American Court), the African Court on Human and Peoples' Rights (African Court) and the African Commission on Human and Peoples' Rights (African Commission). Cases include, *inter alia*, *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua,*[278] *Case of the Saramaka People v Suriname,*[279] *Case of Kaliña and Lokono Peoples v Suriname*[280] and *the Endorois* case.[281] Numerous Concluding Observations provided by the HRC, the CESCR and the CERD are also examined. The scholarly discussion commonly agrees that benefit-sharing has been progressively integrated in the international human rights law in various contexts relating to lands and natural resources.[282] In comparison, the property right to intangible knowledge has not been widely established as a human

[277] Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People' (19 July 2010) UN Doc A/HRC/15/37 paras 67 and 76-78.

[278] *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* [31 August 2001] (Inter-American Court of Human Rights) IACHR Series C no 79.

[279] *Case of the Saramaka People v Suriname* (n 230).

[280] *Case of Kaliña and Lokono Peoples v Suriname* [25 November 2015] (Inter-American Court of Human Rights) IACHR Series C no 309.

[281] *Endorois Case* (n 230).

[282] See Gilbert, *Natural Resources and Human Rights: An Appraisal* (n 159) 75 and Morgera (n 12) 8.

right but is increasingly addressed by international law at various avenues, including human rights, the CBD and the regime regulating IPPs. [283]

2.3.2.1 Property right to land and resources

In the *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua,* decided in 2001, the Inter-American Court has confirmed the property rights of the Indigenous Awas Tingni community to their communal lands[284] and concluded that Nicaragua had violated this right by granting permission to logging activities on the communities' traditional lands and not adequately recognising and providing protection to the community's traditional land tenure.[285] The Court also issued monetary compensation for the benefit of the Awas Tingni Community based on mutual agreements.[286] There was, nevertheless, no explicit recognition of benefit-sharing vis-à-vis the right to property pertaining to land and resources. Similarly, in the *Case of the Yakye Axa Indigenous Community v Paraguay* [287] and the *Case of the Indigenous Community Sawhoyamaxa v Paraguay,* [288] decided in 2005 and 2006 respectively, the Inter-American Court has established that the cultural ties of the Indigenous communities have with their land and resources shall be protected under property rights.[289] And the property rights shall cover both the private property of individuals and communal

[283] Coombe, 'Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity' (n 257) 59, Ostergard (n 259) 156,Daes (n 257) 143, Helfer (n 259) 167, Coombe, 'Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Right or Claims to an Alternative Form of Sustainable Development?' (n 257) 115.

[284] *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 278) para 153.

[285] ibid para 173.

[286] ibid para 167.

[287] *Case of the Yakye Axa Indigenous Community v Paraguay* [17 June 2005] (Inter-American Court of Human Rights) IACHR Series C no 125.

[288] *Case of the Sawhoyamaxa Indigenous Community v Paraguay* [29 March 2006] (Inter-American Court of Human Rights) IACHR Series C No 146.

[289] *ibid* para 118 *and Case of the Yakye Axa Indigenous Community v Paraguay (n 287) para 137.*

property of the members of the Indigenous communities.[290] In 2007, the Inter-American Court decided the milestone *Case of the Saramaka People v Suriname,*[291] in which Indigenous peoples' property rights pertaining to their land and resources have been reaffirmed with an explicit reference to benefit-sharing. The case concerned the issuance of logging and mining concessions for the exploration and extraction of certain natural resources found within Saramaka territory. Recognising the special relationship of the Saramaka people as a distinct social, cultural and economic group with their ancestral territory,[292] the Court established that their right to enjoy property in accordance with their communal tradition is underlined by the fundamental right of self-determination.[293] In deciding the extent to which a State may restrict such property right by granting concessions for exploration and extraction activities, the Court stressed that the State may only do so when such a restriction does not deny their survival as a tribal people.[294] In this connection, the Court also articulated three procedural safeguards that the State must abide in order to fulfil their obligation to ensure the right to property of Indigenous peoples, including effective participation, prior environmental and social impact assessments and benefit-sharing.[295] Significantly, based on Article 32 of the UNDRIP and Article 15(2) of the ILO Convention No 169, the Court considered benefit-sharing as an inherent element of the right to property.[296] Thus, establishing the fact that the State failed to carry out the three obligatory procedural safeguards, the Court considered that the logging

[290] *Case of the Sawhoyamaxa Indigenous Community v Paraguay (n 288) para 118.*

[291] *Case of the Saramaka People v Suriname* (n 230).

[292] ibid 23.

[293] ibid 28.

[294] ibid 37.

[295] ibid para 129.

[296] ibid para 138.

concessions issued by the State violated the Saramaka people's communal property rights.[297]

This reasoning has been adopted by the African Commission in the above-mentioned *Endorios* case, where the Commission similarly notes that, because benefit-sharing serves as an important indicator of compliance for property rights, failure to duly compensate would result in a violation of the right to property.[298] It has also been reiterated in the more recent *Case of Kaliña and Lokono Peoples v Suriname* in 2015, in which the Inter-American Court has concluded that because the State of Suriname failed to ensure the three identified safeguards when granting mining concessions, it had violated the right to property pertaining to the lands and natural resources of the Kaliña and Lokono peoples and its members.[299] In this case, the Court has cited expansively the principles and provisions of the instruments under the CBD, including the CBD and its Nagoya Protocol, to address State's obligations with respect to Indigenous peoples.[300] In particular, recognising the State as a party to the CBD therefore abide by its commitments under the CBD framework,[301] the Court highlighted the obligations of Parties towards ILCs in accordance with Article 8(j) of the CBD[302] and to share benefits with concerned ILCs in accordance with the Nagoya Protocol.[303]

In the works of human rights treaty bodies, the connection among the fundamental right of self-determination, the right of ILCs over their lands and natural resources and the procedural safeguards including benefit-sharing is also evident. For

[297] ibid para 154.

[298] *Endorois Case* (n 230) 294.

[299] *Case of Kaliña and Lokono Peoples v Suriname* (n 280) para 230.

[300] See ibid paras 173 176 178 and 183.

[301] ibid para 176.

[302] ibid para 178.

[303] ibid para 181.

instance, based on the right of self-determination that requires "in no case may a people be deprived of its own means of subsistence", the HRC has commented that Canada should reform its laws and internal policies in order to guarantee the Indigenous peoples can fully enjoy their rights over lands and natural resources.[304] The CESCR has also suggested that the Congo Government should ensure the protection of Indigenous peoples' rights to their ancestral lands and natural resources, and their benefits over natural resources exploitation when issuing logging concessions.[305] Furthermore, the CERD has issued numerous Concluding Observations to urge State Parties to recognise and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources,[306] in which the procedural requirements of FPIC, reparation and compensation, equitable sharing of benefits and access to justice are explicitly addressed.[307]

[304] HRC, 'Concluding Observations of the Human Rights Committee on Canada' (7 April 1999) UN Doc CCPR/C/79/Add.105 para 8.

[305] CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights Democratic Republic of the Congo' (16 December 2009) UN Doc E/C.12/COD/CO/4 para 14.

[306] See CERD, *CERD General Recommendation No. 23* (n 162) para 5, CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Cambodia' (30 March 1998) UN Doc CERD/C/304/Add.54 para 13, CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Norway' (10 December 2003) UN Doc CERD/C/63/CO/8 para 18, CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Bolivia' (10 December 2003) UN Doc CERD/C/63/CO/2 para 13 ; CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Argentina' (10 December 2004) UN Doc CERD/C/65/CO/1 para 16, CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Brazil' (28 April 2004) UN Doc CERD/C/64/CO/2 para 15 and CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Suriname' (28 April 2004) UN Doc CERD/C/64/CO/9 para 12.

[307] CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination of Australia' (14 April 2005) UN Doc CERD/C/AUS/CO/14 para 17, CERD, 'Report of the Committee on the Elimination of Racial Discrimination' (2002) UN Doc A/57/18 para 330 and CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination of Ecuador* (n 173) para 16.

2.3.2.2 Property rights to traditional knowledge

As mentioned above, Article 31 of the UNDRIP recognises the right of Indigenous peoples to cultural heritage, traditional knowledge, and traditional cultural expressions, including the right to maintain, control, protect and develop their intellectual property over such resources. In this context, States are obliged to take effective measures to recognise and protect the exercise of these rights in conjunction with Indigenous peoples.[308] Thus, the property right of Indigenous peoples over their TK, including particularly IPRs, is established by the UNDRIP.[309] Stoll suggests that this human right to TK has two dimensions, including an internal dimension for Indigenous peoples themselves to use, maintain and develop their TK and an external dimension to prevent intervention and misappropriation of such knowledge by third parties.[310] Based on this observation, it can be argued that the internal dimension requires States to refrain from any kind of intervention that might affect Indigenous peoples' right to use, practice and develop their TK—a negative obligation to respect Indigenous peoples' right over TK. It also implies a possibility of ILCs claiming exclusive property right over TK themselves.[311] Meanwhile, the external dimension of the right also imposes a positive obligation on States to take effective measures to assist the Indigenous peoples in controlling and protecting their TK. This may include, establishing national legislation to recognise the customary rules and community protocols of Indigenous peoples with respect to the use and development of their TK,

[308] UNDRIP, art 31 (2).

[309] This legal qualification of TK as intellectual property also manifests in the drafting history of the UNDRIP, see Peter-Tobias Stoll, 'Intellectual Property and Technologies Article 31' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: a Commentary* (First edn, Oxford University Press 2018) 300.

[310] ibid 310.

[311] See David R. Downes, 'How Intellectual Property Could be a Tool to Protect Traditional Knowledge' (2000) 25 (2) Columbia Journal of Environmental Law, 274 and Maxim V. Gubarev, 'Misappropriation and Patenting of Traditional Ethnobotanical Knowledge and Genetic Resources' (2012) 8 (1) Journal of Food Law & Policy, 90.

so that such TK is effectively controlled by Indigenous peoples and protected in accordance with their traditions and customs.[312] Furthermore, the external dimension of the property right also requires not only governments but also non-State actors to respect the customary rules of the Indigenous peoples about their TK.

There is very limited human rights jurisprudence on the property rights of IPLCs pertaining to TK. The only reference is provided by the CERD in 2017. In the Concluding Observations on the periodic reports of New Zealand, the CERD addresses the issue about the intellectual and cultural property rights of the Māori people. Specifically, the CERD is concerned about the lack of progress in the national implementation regarding Māori intellectual and cultural property rights and Māori treasured possessions as required by a national tribunal—the Waitangi Tribunal—through its Wai 262 decision.[313] Against this background, the CERD has recommended that the State Party shall take measures to effectively implement the Wai 262 decision and address non-compliance with the Treaty of Waitangi as well as the UNDRIP.[314]

The scholarly discussion about the interrelationship among different legal frameworks underlining the development of the property right to TK of Indigenous peoples also merits attention. Ni has observed that the stipulation in Article 31 of the

---

[312] Stoll (n 309) 313.

[313] The Waitangi Tribunal is a New Zealand permanent commission of inquiry established under the Treaty of Waitangi Act 1975, addressing the intellectual property rights and treasured elements of Māori culture. The Wai 262 decision is a report released in 2011 with respect to the Wai 262 Claim. See Waitangi Tribunal, *Ko Aotearoa Tēnei: a Report into Claims concerning New Zealand Law and Policy affecting Māori Culture and Identity. Te Taumata Tuatahi.* (Waitangi Tribunal, 2010) 2 <https://www.waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/> accessed 28/01/2019. and CERD, 'Concluding Observations on the Combined Twenty-first and Twenty-second Periodic Reports of New Zealand' (22 September 2017) UN Doc CERD/C/NZL/CO/21-22 para 16.

[314] CERD, *Concluding Observations on the Combined Twenty-first and Twenty-second Periodic Reports of New Zealand* (n 313) para 17.

UNDRIP was mostly built upon the development in international environmental law, in particular, the CBD.[315] The UNDRIP has an impact on the Nagoya Protocol in turn, as noted in the Preamble of the Protocol and more implicitly in its operative clauses with respect to benefit-sharing with ILCs.[316] Meanwhile, the ongoing articulation about the protection of TK from a property and commercial perspective under the World Intellectual Property Organization (WIPO) and WTO-TRIPS frameworks, which might specify a proprietary right of TK in a multilateral treaty in the future, echoes the explicit reference to IPRs of TK in Article 31 of the UNDRIP.[317] These diverse legal perspectives reflect the dynamicity and the crosscutting nature of TK-related issues,[318] which might not be sufficiently addressed by any single international legal forum.[319] It also implies that the property right to TK as a human right is still very young and needs further elaboration at both international and national levels.

2.3.3 Human rights implications

The human right to property is well established at the international level. As an important means of subsistence of many peoples and communities, the property right to lands, territories and natural resources is inextricably linked with the right of self-determination and the cultural rights of Indigenous peoples and minority groups. In particular, the rights of Indigenous peoples to their land and resources are recognised in the ILO Convention 169 and the UNDRIP, in connection with notions of cultural integrity and procedural requirements such as FPIC and benefit-sharing. This

[315] Kuei-Jung Ni, 'Traditional Knowledge and Global Lawmaking' (2011) 10 (2) Northwestern Journal of International Human Rights, 112.

[316] Morgera, Tsioumani and Buck (n 13) 119.

[317] See Traditional Knowledge and Folklore WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, 'The Protection of Traditional Knowledge: Draft Articles' (2 June 2014) WIPO Doc WIPO/GRTKF/IC/28/5 and Thomas Cottier and Marion Panizzon, 'Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection' (2004) 7 (2) Journal of International Economic Law, 371.

[318] See the discussion in the previous section 1.2 of chapter two.

[319] Ni (n 315) 114.

recognition imposes a range of responsibilities upon States, including, *inter alia*, to guarantee effective protection to Indigenous peoples' property rights, ensure their participation in decision-making processes and provide fair compensation in cases of violation. On the one hand, the analysis of the jurisprudential interpretations provided under the Inter-American and the African systems demonstrate that benefit-sharing has been gradually substantiated as an inseparable element of IPLCs' right to property with respect to their lands and tangible resources—regarded as a "procedural safeguard" as well as an "important indicator" of States' compliance with their human rights obligations. On the other hand, the property right to intangible knowledge has not been widely established as a human right but is increasingly addressed at a number of international legal avenues, including human rights, the CBD and the WIPO.

Against this background, three human rights implications can be drawn in relation to the benefit-sharing provisions in the Nagoya Protocol. First, the recognition of benefit-sharing as an essential element of human rights may strengthen the normative and procedural significance of benefit-sharing established by the Nagoya Protocol. As States bear human rights obligations to protect IPLCs' property rights pertaining to lands, resources and TK, they shall not only refrain from intervening in the practices of IPLCs, but also take positive measures to ensure compliance by non-State actors and provide adequate means to address non-compliance. This obligation is in particular relevant to the distinctive aspect of intra-State benefit-sharing when MAT is negotiated between non-State actors and IPLCs. In the ABS context, such obligation means that the States need to recognise the customary laws and community procedures of IPLCs in controlling and using their natural resources and TK and to support capacity-building of IPLCs. It also links to the realisation of fair and equitable standards, as discussed in the previous section 1.4, which demand respect for IPLCs' perception of fairness and equity in accordance with their priorities and traditions. Thus, IPLCs' human right to property could provide stronger ground for their benefit-

sharing claims. It will also help to address the potential negative influence of benefit-sharing on IPLCs, as the monetary implication may downplay the social and cultural value of TK for holders and their communities.[320] Fundamentally, the strengthened procedural requirements of ABS, including capacity-building, benefit-sharing and the development of IPLCs' community protocols could in turn contribute to safeguarding the human right to property of IPLCs.

Second, the emerging human rights recognition of a property right to TK envisages a wider scope of TK protection and its subsequent interpretation and implementation may offer more robust protection to TK. As the Nagoya Protocol only covers TK that is associated with GR, it falls short of address issues relating to other types of TK held by IPLCs. In comparison, as Article 31 of the UNDRIP covers a broad spectrum of TK, Stoll has suggested that it could contribute to "generalising" rights of Indigenous peoples pertaining to TK, including the exclusive IPRs.[321] In fact, there are already efforts to initiate cross-regime dialogue and cooperation among the Nagoya Protocol, the human rights and the WIPO frameworks with respect to TK protection.[322] Procedural requirements such as PIC and benefit-sharing have been increasingly incorporated into these co-existing international frameworks.[323] In the previous section 1.3.1, I highlighted the outstanding feature of the provisions of the Nagoya Protocol on Parties' obligations vis-à-vis TK that they contained much fewer caveats and no reference to domestic legislation. In light of the human rights

---

[320] Graham Dutfield, 'TK Unlimited: The Emerging but Incoherent International Law of Traditional Knowledge Protection' (2017) 20 (5-6) Journal of World Intellectual Property, 148.

[321] Stoll (n 309) 315.

[322] Cooperation between the CBD and the UNPFII see Patricia W. Birnie, Alan E. Boyle and Catherine Redgwell, *International Law and the Environment* (Third edn, Oxford University Press 2009) 214.

[323] See Anil K Gupta, *WIPO-UNEP Study on the Role of Intellectual Property Rights in the Sharing of Benefits Arising from the Use of Biological Resources and Associated Traditional Knowledge* (WIPO UNEP 2004) 11 and Chidi Oguamanam, *International law and indigenous knowledge: intellectual property, plant biodiversity, and traditional medicine* (University of Toronto Press 2006) 191.

development in articulating Indigenous peoples' rights pertaining to TK, it can thus be confirmed that issues pertaining to TK protection cannot be subject to domestic laws but need to be considered against the broader context of international law. This indicates that TK, albeit in many domestic circumstances remains publicly accessible, must be obtained and used under certain procedural safeguards like FPIC and benefit-sharing. This is important especially considering that the Protocol does not define what utilisation of TK means.

Furthermore, the CBD and the Nagoya Protocol could provide detailed and practical international standards to support the interpretation of human rights norms in operationalising benefit-sharing. Based on the explicit reference to the CBD and the Nagoya Protocol in the 2015 *Case of Kaliña and Lokono Peoples v Suriname,* Morgera has argued that the jurisprudential practice of the Inter-American Court demonstrated the potential of the international biodiversity law to complement certain shortcomings in international human rights law, including conceptual inconsistency concerning benefit-sharing and the lack of detailed modalities for its application.[324] She suggests that, as the ABS terms could offer a "contextual and evolutionally interpretation of human rights treaties", they bear great potential to assist in the jurisprudential interpretations of international human rights bodies, regional human rights courts, and national courts.[325] This observation is equally true in the context of elaborating the procedural elements of the property right to TK as a human right. It demonstrates the potential of a mutually supportive interpretation of the Nagoya Protocol and human rights in judicial practices.

Finally, to interpret and implement the Nagoya Protocol in light of international human rights norms could reinforce the internationally-recognised values and

[324] Morgera (n 12) 8.

[325] ibid 12.

principles that are relevant to the protection of IPLCs' rights.[326] This mutually supportive interpretation could also foster the realisation of a web of intertwined rights of IPLCs, including, not only the rights to land, resources and TK, but also the right to culture, development and right of self-determination.[327] Although the UNDRIP remains a non-binding instrument, its normative importance can be reinforced through the compliance mechanism and the national implementation of the CBD and the Nagoya Protocol. Indeed, as noted by Victoria Tauli-Corpuz, the UN Special Rapporteurs on the rights of Indigenous peoples, the international biodiversity law and human rights law are two interconnected and complementary bodies of law and that the CBD defends fully the rights of Indigenous peoples and requires full compliance of the State's vis-à-vis their international human rights obligations.[328] Arguably, this process could also contribute to alleviating the potential clash of cultures, national policies, enforcement strategies and normative conflicts, generated from the multilateral law-making processes and the varying degrees of national implementation.[329] Thus, I argue that the principle of mutual supportiveness is essential for achieving the respective goals of international legal frameworks and harmonising the common principles and procedural requirements in protecting IPLCs' rights over their lands, territories, natural resources and TK.

---

[326] S. James Anaya, 'Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend' (2005) 16 (2) Colorado Journal of International Environmental Law and Policy, 238.

[327] Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights - Why Living Law Matters* (Routledge 2014) 156.

[328] Expert opinion provided by Victoria Tauli-Corpuz during the public hearing held on 3rd and 4th February 2015, see *Case of Kaliña and Lokono Peoples v Suriname* (n 280) para 174.

[329] Peter Drahos, 'A Networked Responsive Regulatory Approach to Protecting Traditional Knowledge' in Daniel Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era* (Oxford University Press 2007) 414.

3. Conclusion

Benefit-sharing is at the core of the international ABS framework. In order to ensure the realisation of fair and equitable benefit-sharing with the provider Parties as well as IPLCs who live in sovereign States, the Nagoya Protocol sets out a range of normative and procedural principles and requirements. Receiving increasing international recognition, the provisions on benefit-sharing of the Nagoya Protocol have also been elaborated through a growing body of scholarly and jurisprudential interpretations. Practical lessons are also learnt from the process of national and international implementation. As demonstrated, these include elaborating normative standards of fairness and equity through various ABS instruments and COP decisions, clarifying the obligations of State Parties to benefit-sharing at both inter-State and intra-State levels, and substantiating MAT as a procedural safeguard for benefit-sharing while taking into account the capacity needs of IPLCs. The examined benefit-sharing provisions provide various entry points to facilitate a mutually supportive interpretation in conjunction with the international human rights standards. For instance, the understanding of fairness and equity in an Indigenous and local context, the obligations of the States to ensure intra-State benefit-sharing with IPLCs and the rights of IPLCs over their TK as recognised in international law.

In this connection, I examined three substantive international human rights and discussed their implications in relation to benefit-sharing. In particular, in light of the human right to equality and non-discrimination, I argued that the ABS standards of fairness and equity are akin to equality and non-discrimination in human rights law, which imply that every individual and IPLCs shall be accorded equal rights, equal opportunities and procedural safeguards in order to pursue free and full development. This requires State Parties to eliminate any discriminatory measures and to ensure *de jure* equality, and pay special attention to the protection of women's rights. This is

imperative in situations where gender inequality is embodied in traditional practices or customs of some IPLCs and where women are in a more vulnerable position in the community. Furthermore, built upon the observation that both the Nagoya Protocol and the human right to development reflect the global concern about the inequalities embedded in the world's development process today, I examined the core components and characteristics of the right to development. I suggested that the elaborated standards of benefit-sharing as embedded in the right to development could inform domestic legislators and all stakeholders of ABS of what a benefit-sharing process should entail, in accordance with international human rights standards. In turn, the detailed procedural guidance provided in the Nagoya Protocol could complement the realisation of the human rights to development by providing a toolkit for negotiating and implementing benefit-sharing terms. Based on the ILO Convention 169 and the UNDRIP, as well as a wealth of jurisprudential and scholarly interpretation, I investigated the property rights of IPLCs to their lands, territories, natural resources and TK. I observed that benefit-sharing has been substantiated as an inseparable element of Indigenous peoples' right to property and suggested that a mutually supportive interpretation of benefit-sharing may contribute not only to the strengthening of the ABS norms but also to supporting the human rights realisation of benefit-sharing.

IPLCs' human rights are a web of inextricably linked rights. The realisation of these rights depends on the international legal and political recognition as well as the effective implementation of the procedural requirements. Integrating human rights standards into the Nagoya Protocol may contribute to an integrated approach to the protection of IPLCs and the enunciation of the obligations of States, particularly at the intra-State level. It may also anchor the debate of fairness and equity into a human rights context, where the values and perspectives of the IPLCs, as well as their vulnerable members, can be heard, known, and respected.

Chapter Four

Compliance and human rights implications for compliance related provisions of the Nagoya Protocol

This chapter looks at the last pillar of the access and benefit-sharing (ABS) framework—compliance.[1] How to ensure compliance of the Nagoya Protocol? What are the mechanisms to promote compliance with Parties' obligations and address situations of non-compliance? How do Indigenous and local communities (ILCs), as providers of genetic resources (GR) and associated traditional knowledge (TK) therefore legitimate ABS beneficiaries, take part in the compliance process and seek remedy when there is a dispute? What are the applicability of human rights, especially the rights of access to justice, in the context of compliance with the ABS rules of the Nagoya Protocol? In order to address these questions, this chapter starts with an investigation of the compliance mechanism and measures envisaged in the Nagoya Protocol. They contain two aspects. The first is compliance with the international legal obligations set out by the Protocol for its Parties.[2] To understand this aspect of compliance, I need to clarify that, because the Convention on Biological Diversity (CBD) and the Nagoya Protocol are multilateral environmental agreements (MEAs), I focus on the MEAs-based compliance mechanism and procedures.[3] International

[1] In addition to "access" and "benefit-sharing" being another two pillars, see Thomas Greiber and others, *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing* (IUCN 2012) 12.

[2] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization [adopted 29 October 2010, entered into force 12 October 2014] CBD Decision 10/1, art 30.

[3] "Compliance" is a highly contested concept in legal and philosophical debates. As Kingsbury has argued, compliance cannot stand on its own, but must depend on a stipulated theory of international law. As this thesis focuses on the Nagoya Protocol, I look at the particular case of compliance mechanism adopted under MEAs, see Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (1998) 19 (2) Michigan Journal of International Law, 347, Gunther Handl, 'Compliance Control Mechanisms and International Environmental Obligations' (1997) 5 Tulane Journal of International and Comparative Law, 32 and Edith Brown Weiss and Harold Karan Jacobson, 'Assessing the Record and Designing Strategies to Engage

compliance in this context often concerns the design of either "soft" and facilitative procedures, or "hard" and enforcement-oriented measures.[4] As will be discussed, cooperative procedures and institutional mechanism to promote international compliance is envisaged by Article 30 of the Nagoya Protocol and substantiated by the first meeting of the Conference of the Parties serving as the meeting of the Parties (COP-MOP) in 2014,[5] which are hereinafter referred to as the "international compliance mechanism" or "compliance mechanism". The second aspect is that, in order to enhance the inter-operability of the ABS rules, Parties are required to ensure that the utilisation of GR within their jurisdiction complies with the other Parties' ABS legislation or regulatory requirements.[6] This aspect of compliance refers to provider countries' domestic ABS rules as well as negotiated clauses in Mutually Agreed Terms (MAT).[7] Articles 15-18 of the Protocol set out specific requirements for this domestic aspect of compliance, which is hereinafter referred to as the "domestic compliance measures" or "compliance measures".

Countries' in Edith Brown Weiss and Harold Karan Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press 2000) 39.

[4] This reflects the theoretical debate about whether compliance is best promoted through managerial or enforcement-oriented approaches, see Jutta Brunnée, 'Multilateral Environmental Agreements and the Compliance Continuum' in Gerd Winter (ed), *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law* (Cambridge University Press 2006) 388. For the managerial school, see Abram Chayes and Antonia H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1998) 109 and Markus Burgstaller, *Theories of Compliance with International Law* (Martinus Nijhoff 2005) 141. For the enforcement school, see George W. Downs, 'Enforcement and the Evolution of Cooperation' (1998) 19 (2) Michigan Journal of International Law, 319.

[5] NP MOP 1 Decision NP-1/4, 'Cooperative Procedures and Institutional Mechanisms to Promote Compliance with the Nagoya Protocol and to Address Cases of Non-compliance' (20 October 2014) UN Doc UNEP/CBD/NP/COP-MOP/DEC/1/4 2.

[6] Tomme R. Young, 'An International Cooperation Perspective on the Implementation of the Nagoya Protocol' in Elisa Morgera, Matthias Buck and Elsa Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013) 491.

[7] Nagoya Protocol, arts 15-18. See Elisa Morgera, Elsa Tsioumani and Matthias Buck, *Unraveling the Nagoya Protocol: A Commentary on the Nagoya Protocol on Access and Benefit-sharing to the Convention on Biological Diversity* (Brill 2014) 251.

The function and objective of these two aspects of compliance are to ensure the Nagoya Protocol are complied with and that non-compliance is properly addressed at both international and domestic levels. In practice, a Compliance Committee has been elected in 2016 but its working measures are still undergoing elaboration.[8] In comparison, practical impacts are more conspicuous in the context of domestic compliance measures. As will be discussed in section 2, there has accumulated a wealth of experience of State Parties incorporating ABS rules into their respective national legal systems, as well as good business practices and NGOs initiatives of ABS negotiations. The development in both international and domestic contexts of compliance poses opportunities for ILCs to participate in the compliance processes of the Nagoya Protocol, accompanied by challenges to make this participation and involvement effective as well as meaningful. Based on the observations of the previous chapters that ABS rules are increasingly integrated in international human rights law, I suggest that it could also be useful to approach the issue of compliance from a human rights perspective, especially ILCs' right of access to justice and the human rights mechanism of ensuring compliance with inter-State obligations. In light of the principle of mutual supportiveness, this chapter demonstrates the possibilities where human rights norms and mechanism of compliance might inform the interpretation and implementation of the compliance related provisions in the Nagoya Protocol.

This chapter consists of four sections. The first two sections provide an overview of international and domestic compliance mechanisms under the Nagoya Protocol in turn and investigate the role of ILCs in their respective context. Section three examines the implications of international human rights from the perspective of the right of access to justice of ILCs and an inter-State perspective through the lens of State Parties' obligations. The final section concludes on the point where normative

[8] NP Compliance Committee, 'Annotations to the Provisional Agenda' (10 February 2016) UN Doc UNEP/CBD/ABS/CC/1/1/Add.1 para 2.

and practical synergies between international human rights law and the Nagoya Protocol exist and also the challenges and risks persisting at this interface.

1. International compliance mechanism under the Nagoya Protocol

This section investigates the international compliance mechanism under the Nagoya Protocol and its relevance to ILCs in two parts. The first part provides an overview of the compliance mechanism as envisaged in Article 30 of the Protocol and established by the COP-MOP in 2014. The facilitative and non-confrontational characteristic of the mechanism is highlighted in comparison to the dispute settlement procedures under the CBD and the Nagoya Protocol. The innovative features of the mechanism vis-à-vis ILCs are emphasised in the sense that it enables affected ILCs to indirectly trigger the compliance procedures that are traditionally only made available to States. However, as will be demonstrated in the second part, under-elaborated procedures, problematic interpretation, and lack of experience constitute potential obstacles for clarifying the role of ILCs in the compliance mechanism and maximising the effectiveness of their participation. Overall, the opportunity for a greater level of engagement for ILCs in the inter-State compliance process of the Nagoya Protocol is foreseen, and its legal complexities and implications need to be examined in-depth and continuously in the coming years.

1.1 Compliance mechanism and its relationship with dispute settlement

Article 30 of the Nagoya Protocol mandates the COP-MOP to develop cooperative procedures and institutional mechanisms to promote compliance and to address cases of non-compliance in its first meeting.[9] As a result, the compliance mechanism under the Nagoya Protocol is elaborated and established in 2014 by the COP-MOP Decision

[9] Nagoya Protocol, art 30.

NP-1/4.[10] This mechanism aims at offering advice and coordinating assistance to Parties in order to encourage compliance, underlined by its non-binding, non-confrontational and cooperative nature, similar to compliance mechanism adopted in many other MEAs.[11] It is worth noting that the term "compliance" here refers only to the compliance of individual Parties to the Nagoya Protocol with all their obligations under the Protocol, which is to be differentiated from the compliance with domestic laws as will be addressed in section 2.

The Compliance Committee of the Nagoya Protocol (the Committee) consists of 15 members nominated by Parties on the basis of three members endorsed by each of the five regional groups of the United Nations and two representatives of ILCs nominated by ILCs who serve as observers.[12] Although in principle nominees of the members may include representatives of ILCs,[13] the current Committee does not have representatives of ILCs to serves as members.[14] The main difference between the function assigned to the members of the Committee and that to the observers is with the level of participation in the decision-making processes of the Committee. The observers are entitled to participate fully in the deliberations of the Committee, but not to take decisions. Furthermore, when the case concerned does not involve ILCs or relate to the interests of ILCs, Parties can choose to exclude the observers from the

[10] NP-1/4 (n 5) 2.

[11] For instance, *inter alia*, compliance mechanisms adopted under the Montreal Protocol on Substances that Deplete the Ozone Layer [adopted 16 September 1987, entered into force 1 January 1989] 1522 UNTS 3, Kyoto Protocol to the United Nations Framework Convention on Climate Change [adopted 11 December 1997, entered into force 16 February 2005] 2303 UNTS 162 and Cartagena Protocol on Biosafety [adopted 29 January 2000, entered into force 11 September 2003] CBD EXCOP 1 Decision EM-I/3. See Handl (n 3) 29 and Antonio Cardesa-Salzmann, 'Constitutionalising Secondary Rules in Global Environmental Regimes: Non-Compliance Procedures and the Enforcement of Multilateral Environmental Agreements' (2012) 24 (1) Journal of Environmental Law, 104.

[12] Committee (n 8) para 2.

[13] NP-1/4 (n 5) anx sec B para 2.

[14] Committee (n 8) para 2.

deliberation.[15] Both members of the Committee and the observers need to possess competence in terms of technical, legal or scientific expertise in relation to the scope of the Protocol.[16] With a view to achieving consensus, the Committee can take decisions by a three-quarters majority of the presenting members or eight members, whichever is greater.[17]

Three options for referral of a compliance problem to the Committee are made available under the Nagoya Protocol, including a Party-self trigger, a Party-to-Party trigger and a COP-MOP trigger.[18] The overall triggering mechanism of the Protocol meets modestly the scholarly and public expectations even though it does not include, for example, a public trigger (stakeholders/NGOs) as has been adopted under the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention).[19] Nevertheless, the Committee is assigned with a novel function to proactively examine: A) systemic issues of general non-compliance, B) situations where a Party fails to submit its national report as requested by Article 29 of the Protocol, and C) situations where *information* indicates that the Party concerned faces difficulties to comply with its obligations under the Protocol.[20] Based on the results of such proactive examination, the Committee may decide whether to proceed with the standard compliance procedures or not. Thus, it could be argued that the Committee also has a power of triggering the compliance procedures in addition to the three explicitly established

[15] However, the COP-MOP does not articulate the standards or the authority to determine whether the case relate to the interests of ILCs or not.

[16] NP-1/4 (n 5) anx sec B para 4.

[17] ibid anx sec B para 11.

[18] ibid anx sec D para 1.

[19] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [adopted 25 June 1998, entered into force 30 October 2001]. See Morgera, Tsioumani and Buck (n 7) 350 and IUCN, 'Submission of Views on Cooperative Procedures and Institutional Mechanisms to Promote Compliance with the Protocol and to Address Cases of Non-compliance' (2011) 4.

[20] NP-1/4 (n 5) anx sec D para 9. Emphasis added.

triggers. In this context, it is worth noting that one legitimate source of information for the examination is from directly affected ILCs. By enabling ILCs to submit information about non-compliance to the Committee, the compliance mechanism of the Nagoya Protocol facilitates ILCs' participation and, arguably, provides them with a power to indirectly trigger the compliance procedures through the Committee. Furthermore, because the information-based examination is linked with the triggering procedures, the Committee's function also expands from, traditionally, only addressing non-compliance *between* Parties, to monitor and address Parties' compliance with their obligations towards ILCs. [21] These two pioneering characteristics of the compliance mechanism under the Nagoya Protocol are unprecedented in any MEAs at the time of writing.

The measures established for the Committee to promote compliance and address non-compliance are mostly of a facilitative nature. The Committee may offer advice or facilitate assistance to the Party concerned, invite them to submit progress reports or request specific implementation plans with appropriate steps, agreed timeframe and assessment indicators.[22] The COP-MOP may also take these measures upon recommendations of the Committee and facilitate more complicated measures on capacity-building, such as access to financial and technical assistance, technology transfer and training. Importantly, the COP-MOP reserves the discretion to decide on stronger and more serious measures in cases of grave or repeated non-compliance.[23]

Overall, it has only been five years since the Nagoya Protocol entered into force. Consequently, there is a limited amount of experience with respect to the implementation of the Protocol and the operational performance of the Committee.

[21] Morgera, Tsioumani and Buck (n 7) 356.

[22] NP-1/4 (n 5) anx sec F para 2.

[23] ibid, anx sec F para 3.

Indeed the compliance mechanism is still "in the process of establishing its procedures and ways of working".[24] However, the role of the Compliance Committee under the Nagoya Protocol will increase with time as its experience with implementation cumulates.[25]

Dispute settlement. Article 30 of the Nagoya Protocol explicitly differentiates the compliance procedures from the dispute settlement procedures, which are pursuant to Article 27 of the CBD. According to Article 27, in the event of a dispute between Parties concerning the interpretation or application of the CBD (and its protocols unless otherwise provided), the Parties shall seek solution by negotiation.[26] When an agreement cannot be reached by negotiation, the Parties may jointly seek the good offices of, or request mediation by, a third Party.[27] If these two means do not solve the dispute, Parties may also declare the acceptance of arbitration or the jurisdiction of the ICJ.[28] Finally, when the Parties to the dispute have not accepted the same or any procedure, the dispute shall be submitted to conciliation as provided in the Annex II of the CBD.[29] Thus, "classical" means of conflict resolution including binding and non-binding procedures are provided under the CBD and the Nagoya Protocol, with a clear priority for non-binding procedures.[30] Although judicial and arbitrational means are available for dispute settlement, in practice, such procedures have never been

[24] NP Compliance Committee, 'Synthesis of Views on the Need for and Modalities of Support to Address Challenges Related to Compliance With The Provisions of the Nagoya Protocol, with A View to Making Effective Use Of the Compliance Mechanism' (22 February 2016) UN Doc UNEP/CBD/ABS/CC/1/3 para 11.

[25] NP Compliance Committee, 'Future Work of the Compliance Committee for 2017-2018' (29 February 2016) UN Doc UNEP/CBD/ABS/CC/1/4 para 17.

[26] Convention on Biological Diversity [adopted 5 June 1992, entered into force 29 December 1993] 1760 UNTS 79, art 27(1).

[27] ibid art 27(2).

[28] ibid art 27(3).

[29] ibid art 27(4).

[30] Greiber and others (n 1) 248.

triggered under the CBD framework and are rarely used under other MEAs.[31] The Chayeses and Mitchell have termed this characteristic as "managerial", in the sense that effective management and organisation to facilitate the compliance of treaty obligations is more important than penalising parties for failing to comply.[32] The Chayeses have also explained that non-compliance with multilateral legal norms often stemming from the ambiguity of treaty language, limitations on Parties' capacity to fulfil their obligations and the time lags between a State's commitment and performance.[33] This approach could facilitates the understanding of compliance mechanism in the Nagoya Protocol and in MEAs in general. First, adequate information can be gathered, relying on the function of the treaty supervisory bodies through techniques like reporting, monitoring and assessing. This supports the questions of treaty interpretation and compliance to be dealt with in a multilateral manner and is in general more cost-effective compared to a lengthy and expensive judicial process.[34] Second, as Cardesa-Salzmann has suggested, the dynamic and complex nature of environmental issues requires a more holistic and managerial approach rather than the traditional reactive approach that is vulnerable to States' forum shopping.[35] Finally, Victor and others have demonstrated that community political pressure and non-binding commitments might prove to be more effective in achieving collective goals in MEAs rather than binding obligations that are safeguarded by adversarial and confrontational methods of addressing non-

[31] Brunnée (n 4) 387.

[32] Abram Chayes, Antonia H. Chayes and Ronald B. Mitchell, 'Managing Compliance: A Comparative Perspective' in Edith Brown Weiss and Harold Karan Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press 2000) 39-62.

[33] Chayes and Chayes (n 4) 15 and Abram Chayes and Antonia H. Chayes, 'On Compliance' (1993) 47 (2) International Organization, 175.

[34] Patricia W. Birnie, Alan E. Boyle and Catherine Redgwell, *International Law and the Environment* (Third edn, Oxford University Press 2009) 239.

[35] Cardesa-Salzmann (n 11) 112.

compliance.[36] For these reasons, the following discussion only concerns the compliance mechanism, but not the dispute settlement procedures, under the Nagoya Protocol.

1.2 Role of ILCs in the compliance mechanism

The role of ILCs in the compliance mechanism under the Nagoya Protocol is threefold: A) ILCs' representatives as observers and potentially as members in the Committee; B) directly affected ILCs may submit information to the Secretariat about non-compliance; and C) ILCs experts may provide advice or consultation to the Committee when asked after the triggering of the procedures.[37] As demonstrated, these figures distinguish the compliance mechanism of the Nagoya Protocol from its equivalents in other MEAs in the sense that it anticipates an unprecedented level of participation of ILCs. As a result, the Compliance Committee is capable of addressing Parties' compliance with their obligations towards ILCs. Nevertheless, to what extent and how such possibility can be realised remain unclear in both theoretical and practical terms. This section discusses the role of ILCs in the compliance mechanism and its legal implications from an interpretative standpoint.

The specific function and working methods with respect to the observers and the members of the Committee that are ILCs have not been elaborated under the Nagoya Protocol. Neither have the procedures of information-gathering nor consultation with affected ILCs or independent experts after the triggering of the procedures by the Committee. However, it is possible to observe that the current setup of the compliance mechanism renders considerable attention to issues relating to ILCs. ILCs' observers and members are able to share opinions and participate in the process

[36] See essays in David G. Victor, Kal Raustiala and Eugene B. Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments : Theory and Practice* (MIT Press 1998) 1.

[37] NP-1/4 (n 5) anx sec E.

of monitoring, examining, reviewing and elaborating before and/or during a submission and their situation may be re-assessed after the triggering by independent experts. Comparing this to the Aarhus Convention, which has a more elaborated compliance mechanism; it is also reasonable to suggest that it is too early to assess the functionality of the Protocol's compliance mechanism in full, especially, the effectiveness of the ways in which ILCs are included. Entered into force in 2001 and had its first Compliance Committee elected in 2002, the Aarhus Convention is still in the process of elaborating its procedural guidance to the Compliance Committee.[38] In addition, the compliance mechanism is mostly triggered by communications brought by public (166 communications at the time of writing), whereas only three submissions were made by Parties, 3 requests by its MOP and no referrals by the Secretariat.[39]

Nevertheless, the procedures under the Nagoya Protocol with respect to the information from ILCs are problematic. According to the Nagoya Protocol MOP Decision 1/4, in addition to the information based on Parties' national reports and the Access and Benefit-sharing Clearing-House (ABSCH), the Committee may also consider the information from the Secretariat submitted by the "directly affected" ILCs in order to examine situations of non-compliance. [40] The specific provision reads, "other information related to compliance with Article 12(1) of the Protocol; provided by a directly affected Indigenous or local community, related to provisions of the Protocol". The confusing use of the semicolon in the provision is the first obvious obstacle for interpretation. As a result, it is not clear whether such information needs to relate to Article 12(1) in particular or its general relevance with the Nagoya Protocol

[38] The third draft of the revised Guide to the Aarhus Convention Compliance Committee was prepared for discussion in open session at the 56th meeting of the Compliance Committee (Geneva, 28 February – 3 March 2017).

[39] Statistics available at UNECE, 'Compliance Committee' (*UNECE*, 2002) <https://www.unece.org/env/pp/cc.html> accessed 17/04/2019.

[40] NP-1/4 (n 5) anx sec D para 9(b).

would suffice.[41] Second, there is no guidance on how to define the extent to which an ILC is affected and who has authority to determine whether any ILCs is *directly* affected or not.[42] Third, not all the issues submitted by the ILCs will be transmitted to the Committee by the Secretariat. The issue will be viewed against the information from the Party concerned and solutions between the Party and the ILCs might be encouraged before submitting the issue to the compliance procedures.[43] To conclude, the potential to broaden ILCs' participation in the compliance mechanism under the Nagoya Protocol is foreseen but the processes need to be further elaborated by the COP-MOP.

2. Domestic compliance measures under the Nagoya Protocol

This section investigates the domestic compliance measures under the Nagoya Protocol and its relevance to ILCs. Contributing to a coherent and operational international ABS framework, this domestic aspect of compliance emphasises compliance with respective domestic ABS legislation and regulatory requirements. Based on an overview of the domestic compliance measures as established by Articles 15-18 of the Protocol, I firstly address the conceptual difficulties that are embedded in the legal complexity of ABS transactions. Specifically, domestic compliance measures concern not only domestic public law (e.g. administrative procedures for PIC), but also private law (e.g. contractual terms in MAT), as well as private international law (e.g. applicable jurisdiction). I observe that the current implementation of compliance measures indicates an accelerated progression of transposing the ABS rules of the

[41] This provision is about TK that is associated with GR, which reads: "In implementing their obligations under this Protocol, Parties shall in accordance with domestic law take into consideration indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources."

[42] This links to the problem identified in the previous section 1.1 that there is no procedure of establishing whether a non-compliance case concerns ILCs' interests or not.

[43] NP-1/4 (n 5) anx sec D para 9(b).

Nagoya Protocol into domestic contexts, underpinned by the variance in countries' respective approaches. Examples of the EU legislation and the worldwide incorporation of disclosure requirements into domestic patent systems are provided in this regard. Acknowledging that little scholarly attention has been paid to this development especially with respect to its impacts on ILCs, I then examine potential contribution of the ongoing implementation of domestic compliance measures in safeguarding ILCs' ABS claims and relevant rights, as well as persisting legal or practical uncertainties that would jeopardise this purpose. The possibility of a mutually supportive interpretation in light of relevant human rights standards is highlighted at the end of this section.

2.1 Compliance with domestic ABS legislation and private contractual requirements

Articles 15-18 of the Nagoya Protocol establish the compliance measures with respect to provider Parties' domestic ABS legislation as well as bilateral clauses agreed by MAT. This set of obligations requires user Parties to ensure that the utilisation of GR and associated TK within their jurisdictions complies with providers' domestic ABS requirements and private-law contractual agreements.[44] These provisions are regarded as the cornerstone of the international ABS framework by many developing countries during the negotiation of the Protocol.[45] Specifically, Articles 15 and 16 impose qualified obligations on Parties to take measures to ensure domestic compliance vis-à-vis GR and associated TK, address non-compliance, and cooperate in cases of alleged violations.[46] Article 17 elaborates the ways in which domestic compliance can be supported in a non-exhaustive manner. These include a range of monitoring tools

[44] Morgera, Tsioumani and Buck (n 7) 251.

[45] Gurdial Singh Nijar, 'The Nagoya Protocol on Access and Benefit Sharing of Genetic Resources: Analysis and Implementation Options for Developing Countries' (2011), 5.

[46] For a thorough interpretation of arts 15 and 16, see Greiber and others (n 1) 159.

that aim to enhance transparency and legal certainty, for instance, the designation of checkpoint(s), ABS permits or its equivalents issued by domestic authority that constitute "an internationally recognized certificate of compliance" (IRCC), and the usage of the Clearing-House mechanism for monitoring and information-sharing.[47] Article 18 addresses compliance with contractual terms specifically, covering the issue of dispute resolution and the availability of judicial remedies.[48]

Young has pointed out that these domestic compliance measures contribute to "a coherent and functioning" international ABS framework.[49] This argument is supported by many other scholars including Glowka and Normand, who add that this domestic aspect of compliance is imperative because it ensures the *inter-operability* of respective domestic ABS frameworks, especially considering that these ABS rules may vary as they are often tailored to fit national situations.[50] While incorporating standard measures like PIC and MAT into domestic ABS frameworks may indeed secure a certain level of inter-operability,[51] Morgera warns that it is not without some conceptual difficulties.[52] In particular, while PIC is usually presented as an administrative permit issued by domestic authorities, MAT are subject to private contractual law, even if it is concluded between the public authority and private entities.[53] In situations where more than one jurisdiction is involved, MAT and the resolutions of potential disputes may also concern private international law, which

[47] Nagoya Protocol, art 17.

[48] For an analysis of art 18, see Greiber and others (n 1) 183.

[49] Young (n 6) 491.

[50] Lyle Glowka and Valérie Normand, 'The Nagoya Protocol on Access and Benefit-Sharing: Innovations in International Environmental Law' in Elisa Morgera, Matthias Buck and Elsa Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013) 37.

[51] For a detailed discussion on interpretation and implementation of PIC and MAT see section 2.2 of chapter two and section 1.3.2 of chapter three.

[52] Morgera, Tsioumani and Buck (n 7) 252.

[53] Greiber and others (n 1) 184.

governs issues like applicable jurisdiction, applicable laws within that jurisdiction, and enforcement of foreign judgments and arbitral awards.[54] In this connection, Greiber and others suggest that the applicability of the Nagoya Protocol may be questionable because it is a public international law instrument that is normally reckoned to tackle relationships between States.[55]

In practice, the implementation of domestic compliance measures has accelerated since the Protocol came into force in 2014. Different regions and States have approached it with different means and to varying degrees. For instance, the European Union has enacted EU Regulation No 511/2014 and EU Commission Implementing Regulation 2015/1866 to implement the "compliance measures for users", which put in place strict obligations for EU companies and research institutes to "exercise due diligence" to ascertain that GR and associated TK have been accessed in accordance with applicable ABS legislation or regulatory requirements, and that benefits are fairly and equitably shared upon MAT. [56] EU members are then expected to incorporate these obligations into their national legal systems. Germany and France, for example, have introduced detailed obligations with respect to the declaration of due diligence, including its scope, timelines, competent authority, format and administrative procedures via various general national decrees.[57] Some countries have made the violation of ABS obligations enforceable under their criminal law with

---

[54] Claudio Chiarolla, *Biopiracy and the Role of Private International Law under the Nagoya Protocol* (IDDRI, 2012) 5 <https://www.iddri.org/fr/publications-et-evenements/document-de-travail/biopiracy-and-role-private-international-law-under> accessed 12/06/2019.

[55] Greiber and others (n 1) 184.

[56] Regulation (EU) No 511/2014 of the European Parliament and of the Council of 16 April 2014 on Compliance Measures for Users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union [2014] OJ L 150/59, art 4(1).

[57] See Décret n° 2017-848 du 9 mai 2017 Relatif à L'accès aux Ressources Génétiques et aux Connaissances Traditionnelles associées et au Partage des Avantages Découlant de leur Utilisation [2017] (FR) and Gesetz zur Umsetzung der Verpflichtungen nach dem Nagoya-Protokoll, zur Durchführung der Verordnung (EU) Nr. 511/2014 und zur Änderung des Patentgesetzes sowie zur Änderung des Umweltauditgesetzes [2015] (DE).

sanctions ranging from withdrawing the ABS permit, to economic penalties and imprisonment.[58] Furthermore, worldwide, it has become common practice to set up checkpoints within the patent offices to ensure that the patent applications based on the utilisation of GR and associated TK comply with the domestic ABS rules.[59] In this regard, numerous countries and regions, some of which are not yet Parties to the Nagoya Protocol, have put in place disclosure requirements for IPRs applications. According to the World Intellectual Property Organization (WIPO)'s 2017 update on disclosure requirements regarding GR and/or TK, there are at least 33 countries and/or regions have somehow included a specific disclosure requirement in their national laws or regulations. For instance, Andean Community, Belgium, Bolivia, Brazil, China, Colombia, Costa Rica, [60] Denmark, Ecuador, Egypt, France, India, Peru, the Philippines and South Africa.[61]

Disclosures requirements are usually perceived as a useful measure for enabling mutual recognition among different legal systems, as they enhance the transparency of information. [62] However, scholars have generally agreed that disclosure requirements alone cannot fully address the issue of domestic compliance.[63]

---

[58] For instance, France and the Netherlands, information obtained from the Interim National Reports on the Implementation of the Nagoya Protocol submitted by Parties, available at CBD, 'Access and Benefit-Sharing Clearing-House' (*CBD*, 2014) < https://absch.cbd.int/> accessed 17/12/2019.

[59] UNCTAD, *The Convention on Biological Diversity and the Nagoya Protocol: Intellectual Property Implications--A Handbook on the Interface between Global Access and Benefit Sharing Rules and Intellectual Property* (UNCTAD 2014) 52.

[60] See WIPO, 'Disclosure Requirements Table' (*WIPO*, 2017) <https://www.wipo.int/export/sites/www/tk/en/documents/pdf/genetic_resources_disclosure.pdf> accessed 06/08/2018.

[61] ibid.

[62] See in general, Archon Fung, Mary Graham and David Weil, *Full Disclosure: The Perils and Promise of Transparency* (Cambridge University Press 2007) 117 and Martin A. Girsberger, 'Transparency Measures under Patent Law regarding Genetic Resources and Traditional Knowledge' (2004) 7 (4) Journal of World Intellectual Property, 451.

[63] For a discussion of the limits of disclosure requirements, see Morten W. Tvedt and Tomme R. Young, *Beyond Access: Exploring Implementation of the Fair and Equitable Sharing Commitment in the CBD* (IUCN 2007) 35.

A UN study of the relationship between the CBD and the Intellectual Property Rights (IPRs) regime has suggested that disclosure requirements have to be woven into not only existing IPRs laws, but also general commercialisation rules and the CBD obligations, in order to be fully functional.[64] In this regard, the EU's implementation of the Nagoya Protocol sets a regional example of how disclosure requirements can be incorporated into ABS legislation as part and parcel of due diligence obligations. Nevertheless, the EU approach is also criticised for its limitations. As it centralises the "illegal use" of GR and TK in user countries, the EU legislation does not sufficiently facilitate legitimate claims of the providers of GR and TK in the procedures of accessing, storing, analysing, developing and commercialising these resources.[65] For what the EU approach actually focuses on, Godt warns that the "due diligence obligations" might be reduced to mere documentation duties of the users.[66] With respect to ILCs, Tobin has condemned that the EU implementation does not pay adequate attention to issues of TK.[67] Specifically, the EU Regulation defines TK for the purpose of protection as the TK "that is associated with genetic resources as described in benefit sharing agreements".[68] This definition, as pointed out by Tobin, could effectively exclude all TK that is accessed without a well-defined benefit-sharing agreement or that is not subject to an agreement of any sort.[69] In reality, not all member States of the EU have fully supported the implementation of the EU Regulation or the Protocol itself: there is considerable leeway as well as deliberate

[64] UNCTAD (n 59) 52.

[65] Christine Godt, 'The Multi-Level Implementation of the Nagoya Protocol in the European Union' in Brendan Coolsaet and others (eds), *Implementing the Nagoya Protocol Comparing Access and Benefit-sharing Regimes in Europe* (Nijhoff 2015) 319.

[66] ibid.

[67] Brendan Tobin, 'Biopiracy by Law: European Union Draft Law Threatens Indigenous People's Rights over Their Traditional Knowledge and Genetic Resources' (2014) 36 (2) EIPR: European Intellectual Property Review, 125.

[68] EU Regulation No 511/2014, rec 20 and art 3(7).

[69] Tobin (n 67) 127.

ambiguity embedded in the Protocol and the EU Regulation, which have left much space for the discretion of its Parties. [70]

Another perspective that is relevant to consider in the context of domestic compliance is the role of private entities. In practice, it is mostly companies and research institutes that manage transactions of GR, carry out research and development (R&D) and produce benefits that are to be shared.[71] These private entities are often involved directly or indirectly in negotiating MAT with competent authorities or ILCs. In fact, the powerful multinational corporations do not only have the greatest capacity to utilise and commercialise GR and TK, their behaviour and willingness to comply also play key roles in determining the degree to which the ABS objectives of the CBD and the Nagoya Protocol are fulfilled. [72] In the same vein, Weiss and Jacobson have argued that "sometimes the most effective monitoring of compliance takes place in the private sector", because "corporations have a keen interest in maintaining a level playing field by ensuring that competitors abide by the agreement" and "they also have the resources to monitor compliance, albeit quietly".[73] Incentive measures such as voluntary codes of conducts, guidelines, standard-setting schemes and best practices, may also support and facilitate domestic compliance by private entities.[74] An example

[70] Florian Rabitz, 'Biopiracy after the Nagoya Protocol: Problem Structure, Regime Design and Implementation Challenges' (2015) 9 (2) Brazilian Political Science Review, 48.

[71] Matthias Buck and Clare Hamilton, 'The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity' (2011) 20 (1) Review of European Community & International Environmental Law, 48.

[72] See Elisa Morgera, 'Benefit-Sharing as a Bridge between the Environmental and Human Rights Accountability of Multinational Corporations' in Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press 2015) 38 and Doreen J. McBarnet, 'Corporate Social Responsibility beyond Law, through Law, for Law: the New Corporate Accountability' in Doreen J. McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 9.

[73] Weiss and Jacobson (n 3) 545.

[74] As envisaged in art 20 (1) of the Nagoya Protocol, see also Charles Victor Barber, Sam Johnston and Brendan Tobin, *User Measures: Options for Developing Measures in User Countries to Implement the Access and Benefit–*

of an internationally practised ABS standard is the one prepared by the Union for Ethical BioTrade (UEBT) that promotes the "Sourcing with Respect" of ingredients from biodiversity.[75] UEBT has set a positive business tone, indicating that, by providing a clearer and more level playing field, the Protocol could open up opportunities for companies already working towards ethical practices in their sourcing of biodiversity.[76]

2.2 Relevance to ILCs of the domestic compliance measures

How does the ongoing implementation of domestic compliance measures affect ILCs? Could domestic compliance measures contribute to, if at all, safeguarding ILCs' ABS claims and relevant rights? Are there any persisting legal or practical uncertainties that could jeopardise ILCs' ABS claims and other relevant rights? This section addresses these questions based on the above analysis of the ongoing development of interpreting and implementing domestic compliance measures of the Nagoya Protocol in the EU and worldwide. It focuses on clarifying the legal and practical implications of Articles 15-18 of the Nagoya Protocol vis-a-vis ILCs.

2.2.1 Potential contribution to safeguarding the rights of ILCs

Article 16 on compliance with domestic legislation with respect to TK and Article 18 on compliance with MAT contain provisions that are of particular relevance to ILCs. Specifically, Article 16 (1) requires Parties to take measures to provide that TK utilised within their jurisdiction has been accessed in accordance with PIC or approval and

---

Sharing Provisions of the Convention on Biological Diversity (UNU-IAS, 2003) 16 <http://collections.unu.edu/eserv/UNU:3106/UNUIAS_UserMeasures_2ndEd.pdf> accessed 23/08/2018.

[75] See UEBT, 'Ethical BioTrade Standard' (*UEBT*, 2012) <https://www.ethicalbiotrade.org/setting-the-standard/> accessed 16/08/2018.

[76] See UEBT, 'UEBT briefing note on the Nagoya Protocol' (*UEBT*, 2016) <http://ethicalbiotrade.org/dl/benefitsharing/UEBT-ABS-Nagoya-Protocol.pdf> accessed 16/08/2018.

involvement of ILCs, and that MAT has been established, as required by the domestic ABS rules of the other Party where such ILCs are located.[77] It thus explicitly imposes obligations on Parties to regulate user compliance and by doing so, promote users to act in accordance with domestic ABS legislation or regulatory rules.[78] Encouraging both providers and users to include dispute resolution terms in MAT,[79] Article 18 further requires Parties to ensure that "an opportunity to seek recourse is available under their legal systems" and specifies that the effective measures shall consider "access to justice" as well as "the utilization of mechanisms regarding mutual recognition and enforcement of foreign judgments and arbitral awards".[80]

Against this background, it could be observed that a certain level of protection is established for ILCs and their TK in cases where the State they live in has enacted relevant ABS rules. From a user countries' perspective, in situations where domestic requirements do exist, obligations to respect the domestic rules, address non-compliance and cooperate in cases of alleged violation are unquestionable. In light of Article 18, both user and provider Parties are required to take *effective* measures to ensure ILCs' rights to access to justice and their opportunities to seek recourse under their legal systems. This implies that Parties need to facilitate effectively ILCs' right of access to justice to courts, tribunals and non-judicial remedies. Moreover, private entities are obliged to comply with the legislation or regulatory requirements with respect to obtaining PIC or approval and involvement of the ILCs and negotiating MAT. Otherwise, they would be subject to sanctions in both their home jurisdictions and the providers' jurisdiction where they have obtained the GR.

[77] Nagoya Protocol, art 16.

[78] Greiber and others (n 1) 30.

[79] Nagoya Protocol, art 18(1).

[80] ibid arts 18(2)(3).

In practice, the implementation of these terms has indeed yielded positive results with respect to facilitating access to GR and TK, promoting equitable and fair benefit-sharing and preventing misappropriation and misuse of GR and TK. Take India for example, since it enacted its Biological Diversity Act in 2002[81] and the Traditional Knowledge Digital Library (TKDL) in 2001, about 200 patent applications filed by pharmaceutical companies from all over the world have either been set aside, withdrawn, amended or revoked by pre-grant oppositions submitted to various International Patent Offices along with prior-art evidences from TKDL.[82] Two hundred and twenty IRCC have been issued by India and published on the ABSCH, supporting disclosure requirements and the transparency of information.[83] Other examples include a case in which a French research institution, after being accused of biopiracy against ILCs in French Guiana, agreed to share patent benefits and negotiate ABS terms with the concerned ILCs in 2016.[84] In 2018, the Leibniz DSMZ in Germany—one of the largest biological resources collections in the world—became the first institution with its collections fully reviewed and examined in order to be in compliance with the due diligence requirements of the EU Regulation No 511/2014 and the Nagoya Protocol.[85] As mentioned in the introduction chapter, a court in the Netherlands has ruled that the Dutch patents for processing Teff, an ancient Ethiopian

[81] The 2002 Act is complemented by a serious of other legislation, including Biological Diversity Act [2002] (IN) and Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations [2014] (IN), see CBD, 'Country Profiles: India' (*CBD*, 2018) <https://absch.cbd.int/countries/IN> accessed 10/08/2018.

[82] Similar outcome is expected in about 1200 more cases, see CSIR and AYUSH, 'Traditional Knowledge Digital Library' (*TKDL*) <http://www.tkdl.res.in/tkdl/langdefault/common/Home.asp?GL=Eng> accessed 09/08/2018.

[83] In formation available at CBD, 'Country Profiles: India' (n 81)

[84] See Elisabeth Pain, 'French Institute Agrees to Share Patent Benefits after Biopiracy Accusations' (2016) <http://www.sciencemag.org/news/2016/02/french-institute-agrees-share-patent-benefits-after-biopiracy-accusations> accessed 06/08/2018.

[85] See DSMZ, 'DSMZ is Europe's first Registered Collection' (2017) <https://www.dsmz.de/home/details/entry/dsmz-is-europes-f.html> accessed 06/08/2018.

grain, are null and void on the basis of the EU Regulation in February 2019.[86] These developments manifest the influence of implementing compliance measures in both provider and user countries. Some aspects are directly beneficial for safeguarding ILCs' claims and rights, for instance, a combination of domestic legislation requiring PIC from ILCs in the provider Party and compliance measures enacted in the user Party. Some aspects may not link to ILCs directly but will have long-term and collateral effects on enforcing the ABS rules of the Nagoya Protocol in general, for instance, good practices promoted in the EU area by NGOs and biological resources collections.

2.2.2 Persisting legal and practical challenges

While good legislative and business practices are evident, there persist many legal and practical challenges in interpreting and implementing the domestic compliance measures in harmony with ILCs' rights and ABS claims. First of all, as Articles 15 and 16 require Parties to ensure compliance as required by domestic ABS legislation or regulatory requirements of the other Party,[87] it suggests that the Protocol does not provide for compliance measures with respect to GR and TK held by ILCs who live in countries where there is no applicable ABS rules. This approach poses a risk of relying solely on domestic ABS legislative authority to address GR and TK held by ILCs. The risk may be alleviated with time as more States ratify the Nagoya Protocol, and the process of legislating ABS accelerates in both Parties and non-Party States. Nevertheless, this interpretative limit still excludes a large number of ILCs in the world. It is unfair especially considering many ILCs have no power of influencing domestic legislative processes. In addition, the absence of an explicit reference to the customary

[86] Information available at Rechtbank Den Haag, 'Uitspraken' (*Rechtbank Den Haag*, 07/12/2018) <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2018:13960> accessed 08/05/2019. Background information on Teff case see Regine Andersen and Tone Winge, *The Access and Benefit-Sharing Agreement on Teff Genetic Resources: Facts and Lessons* (Fridtjof Nansen Institute, 2012) 7 <http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Pulications/FNI/FNI-R0612.pdf> accessed 09/07/2018.

[87] Nagoya Protocol, arts 15(1) and 16(1).

laws, community protocols, and procedures of ILCs, as envisaged in Article 12 of the Protocol, further limits the interpretation of the compliance obligations in relation to ILCs. That is, a narrow interpretation would suggest that the compliance obligations do not concern ILCs' customary laws or community protocols unless they have been explicitly recognised and incorporated in the domestic ABS legislation or regulatory requirements of the Party concerned.[88] This limitation is reflected in the current EU Regulation with respect to the scope of TK that the Regulation only covers TK if it is explicitly defined and included in the MAT.[89]

Relying solely on the domestic legislative authority to address GR and TK held by ILCs or to recognise ILCs' customary laws raises multifaceted concerns. It allows too much discretion on the Party governments and aggravates persisting power asymmetries between ILCs and State authorities in a domestic context.[90] From a practical point of view, it would put ILCs in a vulnerable and passive position in terms of participating in the ABS process, negotiating MAT or claiming fair and equitable benefit-sharing. Fundamentally, I argue that this approach is not compatible with the international human rights standards established for ILCs and would potentially jeopardise the realisation of the overall objectives of the CBD and the Nagoya Protocol.

The CBD Working Group on ABS has identified that the issue of domestic legal recognition of ILCs' ABS-related rights as well as ILCs' customary rules touches upon the cross-cutting obligations of Parties under the Protocol to take due regard to

[88] Greiber and others (n 1), 169.

[89] EU Regulation No 511/2014 art 3(7) states that 'traditional knowledge associated with genetic resources' means traditional knowledge held by an indigenous or local community that is relevant for the utilisation of genetic resources and *that is as such described in the mutually agreed terms applying to the utilisation of genetic resources*. Emphasis added.

[90] For a discussion of power asymmetries, see Morgera, Tsioumani and Buck (n 7) 31.

ILCs who live within their jurisdiction.[91] In other words, the intra-State obligations of Parties to the Nagoya Protocol vis-à-vis their ILCs is an obligation that is expected to be fulfilled in domestic context but shall be interpreted in light of broader international law. It requires a re-examination of how States' sovereign rights are constructed and restrained under the international ABS framework.[92] It also demands legal scrutiny of State' specific obligations in ensuring domestic compliance vis-à-vis ILCs. Based on the previous analysis of Article 15-18 of the Nagoya Protocol, it is relevant to investigate whether Parties have an obligation to ensure and enhance the inter-operability of the national ABS frameworks or not. If so, would it include obligations to: A) implement domestic compliance measure with due respect to ILCs' rights over their GR and TK, B) cooperate in good faith in cases of disputes and alleged violations, and C) ensure ILCs' right of access to justice at both international and domestic levels?[93] These questions will be addressed in light of ILCs' relevant human rights in the following sections.

3. Human rights implications on compliance-related provisions

Analysis above demonstrated the facilitative and non-confrontational features of the facilitative and non-confrontational features of the international compliance mechanism under the Nagoya Protocol and the opportunity opened for directly affected ILCs to take part in its procedures. I also discussed specific provisions in the Nagoya Protocol that oblige Parties to ensure ILCs' access to justice with respect to

[91] Nagoya Protocol, art 12(1) and CBD Working Group on ABS, 'Study on Compliance in Relation to the Customary Law of Indigenous and Local Communities, National Law, Across Jurisdictions, and International Law' (6 March 2009) UN Doc UNEP/CBD/WG-ABS/7/INF/5.

[92] For a detailed analysis on the principle of States' sovereignty and its limitations, see section 2.1 of chapter two.

[93] Greiber and others (n 1) 187 and Annalisa Savaresi, 'The International Human Rights Law Implications of the Nagoya Protocol' in Elisa Morgera, Matthias Buck and Elsa Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-Sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013) 53.

compliance with MAT in the process of benefit-sharing. In both contexts, we have seen normative and practical limitations for ILCs to participate fully in the compliance procedures or domestic implementation processes. Would human rights norms and mechanisms be helpful in establishing a mutually supportive interpretation of access to justice and compliance? What are the applicability of human rights of Indigenous peoples and local communities (IPLCs) in the context of ABS, especially when they need to seek remedy? What are the implications of States' human rights obligations in situations where they shall also comply with MEAs-based obligations, in particular, the Nagoya Protocol? In order to answer these questions, this section examines the implications of the human right of access to justice of IPLCs and the nature of State Parties' obligations. This is because the right of access to justice is essential for substantiating and enforcing IPLCs' human rights.[94] An inter-State perspective could also help to unravel the ways in which States are obliged to fulfil their responsibilities and why they do so.[95] I will look at the expansive jurisprudential interpretation provided by international and regional human rights courts and tribunals on IPLCs' human rights in cases concerning access to, utilisation and benefit-sharing of natural resources,[96] as it provides the normative ground to consider the practicality of using human rights mechanism to protect IPLCs' ABS rights. I will also investigate the nature of Parties' obligations under the Nagoya Protocol and discuss possibilities of

[94] Francesco Francioni, 'The Rights of Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press 2007) 1.

[95] As elaborated in the following section 3.2, I look at the scholarly debate about the nature of States' obligations. See in general, Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli and others (eds), *International Human Rights Law* (Third edn, Oxford University Press 2018) 86, Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 (5) European Journal Of International Law, 907 and Cardesa-Salzmann (n 11) 103.

[96] For instance, the 2007 *Saramaka* case and the 2015 *Kaliña and Lokono* case in the Inter-American context, the 2010 Endorois case, and the 2017 *Ogiek* case in the African context. Detailed discussion see the following section 3.1.2.

inter-State legal proceedings, multilateral accountability, and cooperation in light of international human rights law.

3.1 Access to justice in international human rights law

In international law, access to justice generally refers to the possibility of an individual to bring a claim before a court and have a court adjudicate it in accordance with substantive standards of justice and fairness.[97] In a human rights context, it also includes the necessary legal aid provided for persons who otherwise cannot afford the often-prohibitive cost of lawyers and administrative fees of legal proceedings.[98] In fact, Francioni has argued that access to justice, as an essential component of the rule of law, is fundamental and imperative for guaranteeing the respect and protection of human rights.[99] However, the right *per se* faces many controversies with respect to its scope, connotation and implications.[100] Specifically, Francioni argues that access to justice has been construed as "a procedural guarantee dependant on other substantive rights" rather than a human right in itself, although it equally merits legal protection.[101] Hughes warns that a narrow view would suggest that access to justice only entails access the procedures before a court.[102] In the same line, McBride questions the scope

[97] Francioni differentiates the possibility and the substantive standards from one another a general meaning on the one hand, and a qualified meaning on the other. See Francioni (n 94) 1. See also, Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 (2) Buffalo Law Review, 182.

[98] For instance, the legal aid mechanisms employed by the United Nations Development Programme (UNDP) as a human right-based approach to advance access to justice, see UNDP, 'Access to Justice' (2016) <http://www.undp.org/content/undp/en/home/democratic-governance-and-peacebuilding/rule-of-law--justice--security-and-human-rights/access-to-justice.html> accessed 17/08/2018.

[99] Francioni (n 94) 1.

[100] Eilionóir Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Ashgate Publishing 2015) 21.

[101] Francioni (n 94) 32.

[102] Patricia Hughes, 'Law Commissions and Access to Justice: What Justice Should We Be Talking About?' (2008) 46/4 Osgoode Hall Law Journal, 778.

of the right and points out that it is not clear whether States' obligations to ensure effective access to justice would imply only that the domestic courts and tribunals shall be open to all individuals, or it would also imply that a fair process and a just outcome shall also be somewhat secured.[103] To push this argument further, scholars including Trindade, Cappelletti and Garth have asked whether access to justice may also include effective enforcement of the granted remedies.[104] Thus, although a general acceptance of access to justice as human rights concept is evident on the international plane, the scope and connotation of the right remain unsettled. Specifically, it is not clear, whether access to justice, as a right or as a procedural guarantee, entails procedural and substantive requirements for States and other stakeholders to facilitate the process and realise the granted remedies, and if so, to what extent they are obliged to do so.[105] In order to unpack the implications of IPLCs' human right of access to justice and discuss their relevance to the Nagoya Protocol, the following sections look at relevant international instruments and various ways in which the IPLCs' right of access to justice could be realised. These include regional human rights courts and tribunals, international treaty bodies, ICJ and its advisory opinions and domestic tribunals.

3.1.1 International human rights instruments

In human rights instruments, various terms exist to refer to individual's right to seek judicial or administrative remedies. Specific standards for States to fulfil their obligations to ensure the realisation of access to justice are also established to varying degrees. The 1948 Universal Declaration of Human Rights refers to the "right to an

[103] Jeremy McBride, *Access to Justice for Migrants and Asylum-seekers in Europe* (Council of Europe 2009) para 9.

[104] Antônio A. C. Trindade, 'Some Reflections on the Right of Access to Justice in Its Wide Dimension' in Rüdiger Wolfrum, Maja Seršić and Trpimir Šošić (eds), *Contemporary Developments in International Law* (Brill Nijhoff 2015) 464 and Cappelletti and Garth (n 97) 181.

[105] European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law relating to Access to Justice* (Publications Office of the European Union 2016) 16.

effective remedy by the competent national tribunals".[106] Similarly, the 1950 European and the 1969 American Conventions on Human Rights recognise the "right to an effective remedy before a national authority"[107] and the "right to judicial protection" of "a competent court or tribunal"[108] respectively. The International Covenant on Civil and Political Rights (ICCPR) also recognises "effective remedy",[109] but it goes further to establish that the affected rights shall be determined by "competent judicial, administrative or legislative authorities"[110] and granted remedies that shall be enforced.[111] The ICCPR also provides that all persons shall be "equal before the courts and tribunals" and "entitled to a fair and public hearing by a competent, independent and impartial tribunal".[112] The Optional Protocol to the ICCPR elaborates that "who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration".[113] Making the first explicit reference, the 1980 Hague Convention on International Access to Justice requires the contracting Parties to "facilitate international access to justice".[114] The 1989 Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries adopted under the International Labour Organization (ILO Convention 169)

[106] Universal Declaration of Human Rights [10 December 1948] UNGA Res 217 A (III), art 8.

[107] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 [adopted 4 November 1950, entered into force 3 September 1953] ETS 5, art 13.

[108] American Convention on Human Rights, "Pact of San Jose", Costa Rica [adopted 22 November 1969, entered into force 18 July 1978] 1144 UNTS 123, art 25.

[109] International Covenant on Civil and Political Rights [adopted 16 December 1966, entered into force 3 January 1976] 999 UNTS 171, art 2 para 3(a).

[110] ibid art 2 para 3(b).

[111] ibid art 2 para 3(c).

[112] ibid art 14.

[113] Optional Protocol to the International Covenant on Civil and Political Rights [adopted 19 December 1966, entered into force 23 March 1976] 999 UNTS 171, art 2.

[114] Convention on International Access to Justice [adopted 25 October 1980, entered into force 1 May 1988] HCCH Publications 29.

[115] that focuses on Indigenous issues, requires its Parties to safeguard Indigenous rights and that Indigenous peoples "shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights".[116] In Europe, the 1998 Aarhus Convention set out detailed standards for "access to justice in environmental matters" throughout its text.[117] In 2007, the obligation of State Parties to "ensure effective access to justice" is also provided in the Convention on the Rights of Persons with Disabilities.[118] In comparison, the UNDRIP, adopted in the same year, only provides that "States shall take effective measures to ensure that…Indigenous peoples can understand and be understood in political, legal and administrative proceedings". [119] Furthermore, to expand on the non-binding international instruments, the 1992 Rio Declaration on Environment and Development highlights the importance of "effective access to judicial and administrative proceedings, including redress and remedy"[120] and the 2010 UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters advocates for "broad interpretation of standing in proceedings…with a view to achieving effective access to justice" and suggested that "States should ensure that proceedings are fair, open, transparent and equitable".[121]

---

[115] Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries [adopted 27 June 1989, entered into force 5 September 1991] ILO C169.

[116] ibid art 12.

[117] Aarhus Convention, arts 3(9) and 9.

[118] Convention on the Rights of Persons with Disabilities [adopted 24 January 2007, entered into force 3 May 2008] UNGA Res 61/106, art 13.

[119] United Nations Declaration on the Rights of Indigenous Peoples [13 December 2007] UNGA Res 61/295, art 13(2).

[120] Rio Declaration on Environment and Development [12 August 1992] UN Doc A/CONF.151/26 (Vol. I), Principle 10.

[121] UNEP, 'Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters' (26 February 2010) Decision SS.XI/5 Guidelines 18 and 19.

Thus, it can be observed that it is generally established that access to justice shall be effective. Some instruments envisage specific procedural standards, for instance, the Optional Protocol that specifies the condition for individuals' access to international remedies is that domestic means shall be exhausted first and they must present a written communication.[122] Some instruments incorporate both procedural and substantive requirements, for instance, the ICCPR requires not only that all persons shall be *equal* before the tribunals and the tribunals shall be *competent*, *independent* and *impartial,* but also that the granted remedies shall be *enforced.*[123] Standard setting in both procedural and substantive terms can also be found in the Aarhus Convention and the 2010 UNEP Guidelines. In contrast, the provisions in the ILO Convention 169 and the UNDRIP remain vague and conservative. They only imply that Indigenous peoples shall participate in or "understand and be understood by", the legal and administrative proceedings. Such participation is not qualified in the language of right, nor its procedures specified in any substantive terms. Furthermore, it can be observed that human rights norms focus on domestic judicial remedy, whereas an international remedy is only made available when all domestic remedies have been exhausted. Admittedly, the European and American Conventions, as well as the Aarhus Convention have only regional applicability for a limited number of State Parties. The UNDRIP, the Rio Declaration and the UNEP Guidelines are not legally binding in nature. The ILO Convention and the Hague Convention are ratified by very few countries.[124]

[122] Optional Protocol to the ICCPR, art 2. It is also the case with the Hague Convention as it stipulates the means and obligations for Parties with respect to facilitating access to justice.

[123] ICCPR, art 2. Emphasis added.

[124] Number of Contracting Parties to the 1980 Hague Convention is only 28 as of 11/5/2016, see HCCH, 'Status Table: Convention of 25 October 1980 on International Access to Justice' (*HCCH*, 2016) <https://www.hcch.net/en/instruments/conventions/status-table/?cid=91> accessed 19/08/2018.

3.1.2 Regional human rights courts

Adversarial means are available for adjudication of disputed human rights at the regional level. The European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Human and Peoples' Rights exemplify regional efforts for establishing adversarial systems for ensuring access to justice.[125] Over the past few decades, these tribunals have received an increasing number of petitions. The European Court, for instance, has decided on 85,951 applications in 2017 and 42,761 applications in 2018, of which over eighteen thousand are by judgements.[126] The Inter-American Court, in comparison, has received 2494 petitions in 2017 and published five merits reports.[127] The African Court, heard its first contentious case in 2008, has now received 202 applications and finalised 65 cases.[128]

Compared to the statistics of a decade ago, the number of petitions dealt with by these courts has undergone a booming growth. It indicates the increasing influence of the jurisdictions of the regional human rights tribunals. However, some scholars such as Cavallaro and Brewer have also warned that supranational litigation still only affords access to a tiny fraction of victims, which makes its benefits more like a "lottery" to the handful of petitioners whose cases reach a court, as opposed to the vast

---

[125] Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Second edn, Cambridge University Press 2017) 105 and James Cavallaro and Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-first Century: the Case of the Inter-American Court' (2008) 102 (4) American journal of international law, 768.

[126] Council of Europe, *Annual Report 2017 of the European Court of Human Rights* (ECHR, 2018) 163 <https://www.echr.coe.int/Documents/Annual_report_2017_ENG.pdf> accessed 01/07/2019.and Council of Europe, *Annual Report 2018 of the European Court of Human Rights* (ECHR, 2019) 167 <https://www.echr.coe.int/Documents/Annual_report_2018_ENG.pdf> accessed 01/07/2019.

[127] While the Inter-American Court had 1931 petitions at the admissibility stage, 691 cases at the merits stage and 2622 petitions and cases still pending, see IACHR, 'Statistics' (*IACHR*) <http://www.oas.org/en/iachr/multimedia/statistics/statistics.html> accessed 22/08/2018.

[128] Statistic available at African Court on Human and Peoples' Rights, 'Contentious Matters' (*ACHPR*, 2018) <http://en.african-court.org/index.php/cases> accessed 22/04/2019.

number of similarly situated victims.[129] The particular popularity of the European Court also poses a severe administrative challenge to its own capacity—the massive number of applications has created a docket crisis and a "backlog" that is rapidly growing every year.[130] Scholars remain sceptical about the actual level to which the judgements and decisions issued by the human courts could be complied with.[131] In order for the European human rights system to provide more robust and effective remedies, Gerards and Glas have advocated for "a more substantive and general conception of access to justice".[132] Cavallaro and Brewer have proposed that the supranational human rights courts, while remaining impartial, shall adjudicate cases in ways that reflect the reality of a broader social, political and cultural climate prevailing in the domestic contexts, and eventually, to increase the relevance of domestic courts.[133]

As discussed in the previous chapter three on benefit-sharing, there is an expansive jurisprudential interpretation of the human right to property of ILCs in the rulings of regional human rights courts that explicitly mentioned FPIC and benefit-sharing.[134] In particular, the 2007 *Case of the Saramaka People v Suriname* ruled by the Inter-American Court establishes that the right of self-determination, the right to lands and natural resources of the Saramaka people demands procedural safeguards, which States must abide to fulfil their obligations, including effective participation,

[129] Cavallaro and Brewer (n 125) 770.

[130] Laurence R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 (1) European Journal Of International Law, 126.

[131] See for instance, Darren Hawkins and Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights' (2010) 6 (1) Journal of International Law and International Relations, 36 and Emiliem Hafnerburton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110 (5) American Journal of Sociology, 1374.

[132] Janneke H. Gerards and Lize R. Glas, 'Access to justice in the European Convention on Human Rights system' (2017) 35 (1) Netherlands Quarterly of Human Rights, 12.

[133] Cavallaro and Brewer (n 125) 770.

[134] See section 2.3 of chapter three.

prior environmental and social impact assessments and benefit-sharing.[135] This reasoning is also evident in the 2010 *Endorios* case ruled by the African Commission as the Commission held that as benefit-sharing serves as an important indicator of compliance for property rights and failure to duly compensate resulted in a violation of the right to property.[136] In 2015, the Inter-American Court reiterated in the *case of Kaliña and Lokono Peoples v Suriname* that because the State of Suriname failed to ensure the three identified safeguards when granting mining concessions, it had violated the property right to lands and natural resources of the Kaliña and Lokono peoples.[137] In this case, the Court also held that the State of Suriname had failed to comply with its obligation under the CBD and the Nagoya Protocol with respect to ILCs since Suriname is a Party to the CBD.[138]

Thus, it could be argued that regional human rights courts provide an opportunity for IPLCs to seek judicial remedies when their human rights pertaining to lands and natural resource are at stake, which shall also include the rights over their GR and TK.[139] In this light, ABS-related rights and claims could be seen as part and parcel of human rights of IPLCs, because benefit-sharing and participatory requirements are integrated into safeguarding human rights of IPLCs under the regional human rights jurisprudence. Most significantly, in the *Kaliña and Lokono* case, the Inter-American Court cross-referenced States' obligations under the CBD to support its interpretation of human rights and highlighted the Nagoya Protocol even

---

[135] *Case of the Saramaka People v Suriname* [28 November 2007] (Inter-American Court of Human Rights) IACHR Series C no 172 para 129.

[136] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* [2010] (ACHPR) 276/2003 294.

[137] *Case of Kaliña and Lokono Peoples v Suriname* [25 November 2015] (Inter-American Court of Human Rights) IACHR Series C no 309 34.

[138] ibid paras 171-181.

[139] For a detailed discussion on property rights of IPLCs of their lands, natural resources, GR and TK see previous section 2.3 of chapter three.

though Suriname was not a Party to the Protocol. This indicates that a mutually supportive interpretation of States' obligations imposed by international human rights law and ABS law could support the enforcement of one another and the State concerned do not have to be Party to the Nagoya Protocol for the Court to consider its ABS-related obligations. This approach, if widely adopted, could have a profound influence in safeguarding the right of access to justice of IPLCs before human rights courts because the CBD has almost universal ratification. Nevertheless, I acknowledge that the limitations of relying on regional human rights courts and tribunals persist. It is not accessible for all the IPLCs in the world and only covers a tiny fraction of victims of the IPLCs who have attempted to seek remedies from them. The lengthy procedures and cost could also discourage many ILCs to pursue remedies from this approach.

3.1.3 Human rights treaty bodies

In addition to the adversarial means to defend human rights, international human rights treaty bodies provide treaty-based complaints procedures, not only for inter-State communications but also for individuals. It is an important means to monitor and ensure compliance of States Parties with their treaty obligations and to provide international remedies to individuals in cases of violation.[140] However, human rights treaties bodies are not of automatic competence over individual communications—they can only consider cases where relevant States Parties have made the means effective via a declaration or ratifying an optional protocol.[141] By 22 August 2018, there are eight human rights treaty bodies which may, under certain conditions, receive and consider complaints or communications from individual.[142] In so far as the rights

[140] Ilias Bantekas, *International Human Rights Law and Practice* (Cambridge University Press 2013) 273.

[141] ibid 201.

[142] These include, CCPR, CERD, CAT, CEDAW, CRPD, CED, CESCR and CRC, see OHCHR, 'Human Rights Bodies-Complaints Procedures' <https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx> accessed 10/06/2019.

of IPLCs are concerned, there are three most relevant human rights treaty bodies to receive individual communications. These are, the Human Rights Committee (HRC, its Optional Protocol entered into force in 1976 and now has 116 Parties),[143] which monitors implementation of the ICCPR; the Committee on Economic, Social and Cultural Rights (CESCR, its Optional Protocol entered into force in 2013 and has 23 Parties),[144] which monitors implementation of the ICESCR; and the Committee on the Elimination of Racial Discrimination (CERD), which may consider individual petitions alleging violations of the Convention by States parties who have made the necessary declaration under Article 14 of the Convention.

Overall, individual complaints procedures in the human rights law equip individuals with a unique opportunity to seek quasi-judicial remedies at the international level.[145] Individual cases are also often supported by NGOs and human rights lawyers based on various organisational strategic objectives.[146] However, it is not always easy for IPLCs to have their cases heard by human rights treaty bodies. The issue often vests with standing and admissibility.[147] For instance, Tyagi has criticised the fact that the HRC only allows individuals to claim violations and does not

[143] See UNTC, 'Optional Protocol to the International Covenant on Civil and Political Rights' (1966) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-5&chapter=4&clang=_en> accessed 22/08/2018.

[144] See UNTC, 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (*UN Treaty Collection*, 2008) <https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-3-a&chapter=4&lang=en> accessed 22/08/2018.

[145] Markus G. Schmidt, 'Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform' (1992) 41 (3) International and Comparative Law Quarterly, 645 and Sarah Joseph, *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* (Boris Wijkstrom 2006) 39.

[146] Bantekas (n 140) 273. For a case study see Mónica Roa and Barbara Klugman, 'Considering Strategic Litigation as an Advocacy Tool: A Case Study of the Defence of Reproductive Rights in Colombia' (2014) 22 (44) Reproductive Health Matters, 31.

[147] The common steps of the compliance procedures concern admissibility, merits, decision, remedies and implementation.

recognise standing of a group alleging violation of its collective rights, for instance, the right to self-determination.[148] Furthermore, the HRC has provided the notion of "victim" in its previous jurisprudence that individuals and groups need to prove that their rights have been *directly affected* in order to make their cases admissible.[149] Only in exceptional circumstances, the case would also be admissible if the applicants can prove that the violation is reasonably foreseeable or imminent.[150] Last but not least, Bantekas has suggested that the requirement of "exhaustion of domestic remedies" is one of the greatest admissibility hurdles as many cases have received an inadmissibility decision due to the failure to prove that the authors have exhausted domestic remedies.[151] In practice, Bantekas' concern manifests in the operational history of the CESCR: to date it has received 25 individual communications, in which 14 of them are concluded with an inadmissibility decision.[152]

According to the requirements of the Compliance Committee under the Nagoya Protocol, it is also that only "directly affected ILCs" may submit information to the Secretariat in order for the Committee to examine situations of non-compliance.[153] I argued that the criterion "directly affected" is problematic in the ABS context in the previous section 1.2 and that the same reasoning would apply in a human rights context too. In reality, IPLCs often lack financial or technical capacity to not only demonstrate that their rights have been directly affected, but also to prove that they have exhausted domestic remedies. Furthermore, since it is not settled whether

---

[148] For a detailed discussion, see section 3.1 of chapter two. See also, Yogesh Tyagi, *The UN Human Rights Committee: Practice and Procedure* (Cambridge University Press 2011) 401.

[149] See *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v Mauritius* [09 April 1981] (HRC) UN Doc CCPR/C/12/D/35/1978 para 9.1 and *B. d. B. et al. v. The Netherlands* [30 March 1989] (HRC) UN Doc A/44/40 para 6.6.

[150] *Toonen v Australia* [31 March 1994] (HRC) UN Doc CCPR/C/50/D/488/1992 para 5.1.

[151] Bantekas (n 140) 275.

[152] Statistic at OHCHR, 'Jurisprudence' <https://juris.ohchr.org/Search/Results> accessed 14/07/2019.

[153] See the discussion in the previous section 1.2.

the rights over GR and TK held by IPLCs are collective (human) rights or not, it is very difficult to evaluate how useful the individual compliant mechanism might be for ABS purposes. To elaborate, in situations where there is clear and exclusive ownership of IPLCs over GR and TK recognised in domestic context, the mechanism could be used by certain individual right-holders. However, as most of the time TK is collectively managed among a community, it would be difficult for IPLCs to seek remedy in front of human rights treaty bodies that only recognise standing of individuals. From a normative perspective, when the communication contains ABS-related rights and obligations, for instance, States' obligations to consult and obtain FPIC, the enforcement of human rights obligations could meanwhile enhance States' compliance with their obligations as envisaged under the ABS framework. This is evident in three cases regarding violations of IPLCs' cultural rights—*Länsman et al v Finland,*[154] *Jouni E. Länsman et al. v Finland*[155] and the 2009 *Poma Poma v Peru* case.[156] Admittedly, scholars remain sceptical about the actual impact of opinions issued by human rights treaty bodies because their views are not of a binding force for State Parties.[157] However, to pursue further in this arguments requires empirical data and that exceeds the scope of the current thesis.[158]

---

[154] *Länsman et al v Finland* [26 October 1994] (HRC) UN Doc CCPR/C/52/D/511/1992 (1994).

[155] *Jouni E. Länsman et al. v Finland* [30 October 1996] (HRC) UN Doc CCPR/C/58/D/671/1995 (1996).

[156] *Poma Poma v Peru* [24 April 2009] (HRC) UN Doc CCPR/C/95/D/1457/2006.

[157] See conclusions in Christof H. Heyns and Frans Viljoen (eds), *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (Martinus Nijhoff Publishers 2002) 31 and James Crawford, 'The UN Human Rights Treaty System: A System in Crisis?' in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000) 2.

[158] See in general, Oona A. Hathaway, 'Do Human Rights Treaties Make A Difference?' (2002) 111 (8) Yale Law Journal, 2020, Ryan Goodman and Derek Jinks, 'Measuring the Effects of Human Rights Treaties' (2003) 14 (1) European Journal Of International Law, 172 and Oona A. Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (2007) 51 (4) Journal of Conflict Resolution, 588.

3.1.4 International Court of Justice

Established in 1946, the ICJ functions as the principal judicial organ of the UN system.[159] It provides contentious jurisdiction to States and offers advisory opinions upon request by authorised UN bodies, for instance, in relation to non-State peoples.[160] In particular, the issue of peoples' right to self-determination is taken up by the ICJ via three cases, namely, the *Namibia* case in 1970, the *Western Sahara* case in 1975 and *the Israeli Wall* case in 2004. In the advisory opinion on the *Namibia* case in 1970, the ICJ asserted the applicability of self-determination as a principle enshrined in the UN Charter to all peoples in colonial situations.[161] This position has been confirmed by Judge Dillard in the *Western Sahara* case in 1975,[162] where the ICJ formally acknowledged the existence of the Indigenous notion of land rights that is based on a non-European conception of title as generative of "legal ties" between the Mauritanian entity and the territory of Western Sahara.[163] However, since no actual legal effect was given to the Indigenous notion of land rights as opposed to the title derived from a European colonial claim, Reisman regretted that it was a lost opportunity for empowering Indigenous form of political organisations.[164] In a more recent case concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (*the Israeli Wall* case) in 2004, the ICJ reaffirmed that "the right of peoples to self-determination is today a right *erga omnes*", citing the UN Charter

---

[159] Charter of the United Nations [signed 26 June 1945] 1 UNTS XVI, art 92.

[160] Statute of the International Court of Justice [18 April 1946] 33 UNTS 993, art 36. See Javaid Rehman, *International Human Rights Law: A Practical Approach* (Longman 2003) 47.

[161] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [21 June 1971] (ICJ) Rep 16 31. Also see Robert McCorquodale, 'Self-determination: a Human Rights Approach' (1994) 43 International and Comparative Law Quarterly, 858.

[162] *Western Sahara (Advisory Opinion)* [16 October 1975] (ICJ) Rep 12. The Court heard this case at the request of the UN General Assembly.

[163] ibid 40.

[164] W. Michael Reisman, 'Protecting Indigenous Rights in International Adjudication' (1995) 89 (2) American journal of international law, 354.

and the Human Rights Covenants.[165] It concluded that the wall construction, along with measures taken previously, "severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right".[166] Consequently, the ICJ reckoned that Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law.[167]

This brief appraisal of the ICJ's advisory opinions manifests the ongoing engagement of the ICJ in some of the most contentious human rights issues for non-State peoples.[168] Similar to the individual complaints procedures provided by the human rights treaty bodies, this function of the ICJ provides authorised opinion at an international level with significant judicial influence. For instance, Reisman has highlighted that the value and judgements enshrined in these advisory opinions could direct the international *corpus juris* to advance, "case by case, until the international legal system provides justice for all".[169] Rehman also demonstrates that, although in principle, it is not ICJ's role to create law, the decisions and advisory opinions of the ICJ have nevertheless greatly influenced the advancement of international law.[170] With a sharpened focus on Indigenous peoples, Morgan has argued for "reconfiguring" human rights concepts and how they are protected under the UN judicial system vis-à-vis Indigenous peoples,[171] and Magnarella has proposed a change of the Court's

[165] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [9 July 2004] (ICJ) Rep 136 paras 87 and 88.

[166] ibid paras 115-122.

[167] ibid paras 149-154.

[168] Sidi M. Omar, 'The Right to Self-determination and the Indigenous People of Western Sahara' (2008) 21 (1) Cambridge Review of International Affairs, 47.

[169] Reisman (n 164) 362.

[170] Rehman (n 160) 46.

[171] Rhiannon Morgan, *Transforming Law and Institution: Indigenous Peoples, the United Nations and Human Rights* (Ashgate 2011) 117.

Statute to expand standing further to non-State actors to provide better judicial support to Indigenous peoples' right of self-determination.[172] In light of the ongoing debate and practice of the ICJ, it is reasonable to suggest that its function of advisory opinions could be one of the most important legal avenues to address the issue of IPLCs' human rights pertinent to their lands, natural resources, culture, TK and fundamentally, self-determination. This potential is based on the premise that the realisation of IPLCs' human rights of self-determination, development, culture, property and equality are all interlinked and many ABS rights are essentially human rights too.[173]

3.1.5 Domestic remedies

At the domestic level, institutional arrangements like national courts, ombudsperson (Human Rights Commissioners), State-appointed human rights defenders safeguard the realisation of human rights. Although national human rights institutions are not established in every State, Smith and other scholars have suggested that the remedies delivered at national level usually have a greater success of enforcement vis-à-vis international level.[174] The importance of these domestic institutional arrangements with respect to access to justice is three-fold. First, access to justice at the domestic level functions as a prerequisite for the exercise of the international proceedings, as one must exhaust domestic remedies in order to make the case admissible before an international human rights tribunal.[175] Second, it is generally agreed that the application of internationally agreed norms in national court could render substantive power to treaty norms and internationally established standards. For instance, Diver and Miller have edited a collection of case studies demonstrating various ways of

[172] Paul J. Magnarella, 'The Evolving Right of Self-Determination of Indigenous Peoples' (2001) 14 (2) St Thomas Law Review, 426.

[173] See discussion in previous chapters two and three.

[174] Rhona K. M. Smith, *International Human Rights Law* (Eighth edn, Oxford University Press 2018) 159. Examples of domestic implementation see Heyns and Viljoen (n 157) 37.

[175] Francioni (n 94) 7.

enforcing human rights and securing effective remedies in different countries and the contributors have suggested that domestic judges and legislators are arguably best placed to protect human rights.[176] Furthermore, Boyle, Anderson and others have also argued that some human rights treaties, such as the European Convention on Human Rights, are becoming a significant basis for environmental claims and often applicable by national courts.[177] Finally, to look at the practical impact, Cotula and Mathieu have suggested that creating domestic opportunities and enhancing IPLCs' ability to use legal tools to tackle human rights issues could facilitate IPLCs to gain a greater level of control over decisions and processes that affect their lives and rights.[178]

With respect to the Nagoya Protocol, the process of transposing its ABS rules into domestic contexts also has resulted in numerous national ABS legislation and policies. As demonstrated, many EU Member States such as the Netherlands, France and Germany, have incorporated ABS compliance rules into their national civil and criminal laws, thereby making the norms of the Nagoya Protocol domestically justiciable and enforceable.[179] In theory, ABS-related issues may be litigated in jurisdictions where the national implementation of the Nagoya Protocol has taken effect. While there are not yet judicial records on this subject, many cases of administrative remedies provided through patent offices and other means do exist.[180]

---

[176] For instance, Roberto Cippitani, 'The 'Contractual Enforcement' of Human Rights in Europe' in Alice Diver and Jacinta Miller (eds), *Justiciability of Human Rights Law in Domestic Jurisdictions* (Springer 2015) 307 and Alice Diver and Jacinta Miller, 'Can Rights Be Ring-Fenced in Times of Austerity? Equality, Equity and Judicial 'Trusteeship' over the UK's Fairness Agenda' in Alice Diver and Jacinta Miller (eds), *Justiciability of Human Rights Law in Domestic Jurisdictions* (2015) 25.

[177] Alan E. Boyle, 'Human Rights and the Environment: Where Next?' in Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press 2015) 271 and essays about European countries in Michael R. Anderson and Paolo Galizzi (eds), *International Environmental Law in National Courts* (BIICL 2002)

[178] Lorenzo Cotula and Paul Mathieu (eds), *Legal Empowerment in Practice: Using Legal Tools to Secure Land Rights in Africa* (IIED and FAO 2008) 1.

[179] See the previous section 2.1.

[180] For instance, the case of India TK database as discussed in the previous section 2.1.

This process gives similar effect to the Nagoya Protocol as in human rights laws because the treaty norms are given true substance and enforceability via national laws and courts. However, because the CBD and the Nagoya Protocol subject the exact ways to regulate ABS to domestic laws and States' discretion, as discussed in previous chapters, it is not clear to what extent, if at all, State Parties would make rights-based ABS claims admissible for domestic remedies. This uncertainty is closely related to the national recognition of ILCs' rights over their GR and TK, which determines the extent to which the legal empowerment of ILCs could be realised via access to justice at domestic level.[181]

3.1.6 Human rights implications on the Nagoya Protocol

The above analysis has demonstrated the human rights norm of access to justice and various ways in which the IPLCs' right of access to justice could be realised. How could it contribute to interpreting and implementing compliance-related provisions in the Nagoya Protocol? On the one hand, the human rights standards of access to justice could clarify in particular the interpretation of Article 18 of the Nagoya Protocol.[182] Specifically, it could invalidate the narrow interpretation of Article 18 that access to justice in the Nagoya Protocol only refers to access to domestic judicial remedies with respect to the contractual terms established under MAT. This is because access to justice is a fundamental and widely established human right of IPLCs. Furthermore, IPLCs' rights over GR and TK, as they are part and parcel of IPLCs' human rights to their natural resources and culture, cannot be merely subject to contractual agreements.

---

[181] Peter Munyi and Harry Jonas, 'Implementing the Nagoya Protocol in Africa: Opportunities and Challenges for African Indigenous Peoples and Local Communities' in Elisa Morgera, Matthias Buck and Elsa Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013) 234.

[182] As discussed in the previous section 2, Article 18 explicitly requires each Parties to take effective measures regarding access to justice, but the Nagoya Protocol does not define access to justice and no further elaboration is offered by the COP-MOP decision.

As discussed in section 2.2.1, Article 18 implies that Parties need to effectively facilitate access to justice for ILCs to courts, tribunals and other non-judicial remedies. This means that Parties of the Nagoya Protocol shall endeavour to develop legislative and administrative means to facilitate ILCs in ensuring the realisation of their right of access to justice, both in light of Parties' responsibilities to ensure the inter-operability of the ABS framework and more fundamentally, State's international human rights obligations.

On the other hand, as discussed, the practical experience of seeking human rights remedies at both international and domestic levels opens the way for considering the possibility of using human rights mechanism to defend violations of ABS rights and enforcing ABS norms as enshrined in the Nagoya Protocol. In jurisdictions where requirements such as FPIC and benefit-sharing have been explicitly recognised as a procedural safeguard of IPLCs' human rights, it is more conspicuous that the enforcement of human rights and ABS norms may complement each other. As demonstrated, this is the case within the jurisdiction of the Inter-American Court, the African Commission and the HRC. However, prominent legal avenues such as the ICJ and some human rights treaty bodies also have proved to be difficult for IPLCs to approach because of issues relating to standing and admissibility. In general, access to justice guarantees the effectiveness of a legal framework and the protection it accords for certain rights. This effect is strengthened by the process of treaty implementation at the national level, which renders internationally established norms with domestic enforceability via national courts and tribunals. As argued, this process is imperative for both international human rights law and the Nagoya Protocol for it substantiates the international standards in accordance to varying political, social and cultural

contexts.[183] To approach ABS issues from a human rights-based perspective, the opportunities to enhance IPLCs' ability to use legal tools and enunciate States' obligation to facilitate legal empowerment of IPLCs do exist. In turn, recalling the innovative features of the international compliance mechanism under the Nagoya Protocol that envisage an indirect Committee trigger that can be initiated by IPLCs, the ABS mechanism may also salvage the complete incapability of IPLCs to bring legal proceedings in front of international judicial organs. This enables the injured groups to defend their rights and allows IPLCs to participate in the enforcement process of international law. Furthermore, it is worth asking how court systems and quasi-judicial mechanisms at both international and domestic level could be directed and designed to promote equal and affordable accessibility to justice.[184] These questions could be included in the agenda for future scholarly debates but they indeed exceed the scope of this thesis.

3.2 Compliance with States' responsibilities from an inter-State perspective

The issue with compliance of the Nagoya Protocol can also be investigated from an inter-State perspective through the lens of State Parties' obligations. This section investigates the possibilities and limitations of inter-State litigation and cooperation in both international human rights law and the Nagoya Protocol. It also unpacks the normative and practical complementarity between the two frameworks in light of a mutually supportive interpretation. It starts with a discussion of the nature of Parties' obligations, focusing on the distinction of bilateral obligations and collective

[183] For an Brazilian example of using judicial system (prosecutorial institution) to make the law that matters, see Lesley K. McAllister, *Making Law Matter: Environmental Protection and Legal Institutions in Brazil* (Stanford University Press 2008) 152.

[184] Francioni also highlights the relevance of the principles of equal protection of the law, see Francioni (n 94) 5.

obligations that are binding *erga omnes partes*.[185] This clarification is important because different types of obligations imply different legal consequences.[186] For instance, any contracting State is entitled to bring legal proceedings against breach of collective obligations owed to a group of States but only an injured State has standing against breach of bilateral obligations. The key question is, if some obligation under the Nagoya Protocol could be perceived as human rights obligations, is there a possibility that States could invoke the responsibility of any other State for a breach of fair and equitable benefits-sharing – as an *erga omnes partes* obligation – before international judicial organs and international human rights mechanisms? I also examine a shared trend in international human rights law and environmental regimes—the development of "softened" mechanisms to promote compliance of international law and States' cooperation.

3.2.1 Nature of the obligations under the Nagoya Protocol and the human rights law

Different types of obligations exist under general international law. As Mégret and Brunnée have suggested, they could be either unilateral or multilateral, reciprocal or non-reciprocal, temporal or eternal, conditional or unconditional, relative or absolute, or indeed a mixture of some of these characteristics.[187] The distinction between bilateral obligations (or multilateral obligations that can be reduced to "a bundle of bilateral obligations") and collective obligations that are binding *erga omnes partes* therefore cannot be deconstructed into bilateral components, has been central for scholarly debates.[188] For instance, Pauwelyn has elaborated the typology of

[185] Jutta Brunnée, 'Common Areas, Common Heritage, and Common Concern' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2012) 565 and Pauwelyn (n 95) 907.

[186] Mégret (n 95) 90.

[187] Brunnée (n 185) 565 and Mégret (n 95) 86.

[188] Pauwelyn (n 95) 907.

multilateral treaty obligations in the context of World Trade Organization;[189] Cardesa-Salzmann has investigated its implications vis-à-vis global environmental regimes;[190] and Mégret has demonstrated that human rights obligations are in some ways radically distinct from other types of multilateral obligations.[191] For this research, I focus on the nature of the obligations owed by Parties of the Nagoya Protocol as well as international human rights obligations and examine its implication from an inter-State perspective in light of the principle of mutual supportiveness. As a matter of scope, the broader debate about the creation of peremptory rules [192] and *erga omnes* obligations[193] in the context of international environmental law is not considered.

One of the initial recognitions of collective obligation is made by the ICJ in its advisory opinion on R*eservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. [194] By contrasting bilateral approach that speaks of "individual advantages or disadvantages to States" and "the maintenance of a perfect contractual balance between rights and duties", with the underlying objects of the Genocide Convention, the ICJ concluded that, "in such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention."[195] Based on this recognition, the late Special Rapporteur Sir Gerald Fitzmaurice has suggested two sets of obligations under multilateral treaties: A)

[189] ibid.

[190] Cardesa-Salzmann (n 11) 103.

[191] Mégret (n 95) 91.

[192] Eva M. Kornicker Uhlmann, 'State Community Interests, Jus Cogens and Protection of the Global Environment: Developing Criteria for Peremptory Norms' (1998) 11 (1) Georgetown International Environmental Law Review, 101.

[193] Frank Biermann, '"Common concern of humankind": The Emergence of a New Concept of International Environmental Law' (1996) 34 (4) Archiv des Völkerrechts, 426 and Birnie, Boyle and Redgwell (n 34) 190.

[194] Pauwelyn (n 95) 909.

[195] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [28 May 1951] (ICJ) Rep 15 31.

reciprocal obligations that provide for "a mutual interchange of benefits between Parties, and B) integral obligations whose force is "self-existent, absolute and inherent", which must be applied integrally. [196] The former can be compared to obligations constructed under a contract and the latter, because that they are concluded for collective interests, are binding *erga omnes partes.*[197]

The above quotation from the ICJ illustrates the collective nature of human rights obligations. Twenty years later, the ICJ in the *Barcelona Traction* case further articulates that some human rights obligations are indeed *erga omnes*. That is, they are owned "towards the international community as a whole" and "by their nature, are the concern of all States".[198] One example, according to the ICJ in the *East Timor* case in 1995, is the right to self-determination.[199] Additionally, human rights obligations distinctively focus on intra-State relations between States and its individuals. From the perspective of the European Commission of Human Rights, the obligations undertaken by Parties to the European Convention on Human Rights "are essentially of an objective characteristic", which are established to "protect fundamental rights of individual human beings" rather than to create "subjective and reciprocal rights" for Parties themselves.[200] The Inter-American Court of Human Rights also has elaborated this intra-State dimension in one of its advisory opinions, "in concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within

[196] ILC, 'Third Report on the Law of Treaties by Mr. G.G. Fitzmaurice, Special Rapporteur' (1958) UN Doc A/CN.4/115 27.

[197] In some cases, they can be binding *erga omnes* but that aspect is not considered in this chapter. See Pauwelyn (n 95) 908.

[198] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [5 February 1970] (ICJ) Rep 6 para 33.

[199] However, it was observed as an *erga omnes* rights, instead of *erga omens* obligations, see *Case Concerning East Timor (Portugal v Australia)* [30 June 1995] (ICJ) Rep 90 para 29.

[200] *Austria v Italy* [11 January 1961] (ECHR) APP No. 788/60 19.

which they, for the common good, assume various obligations, not in relations to other States, but towards all individuals within their jurisdiction".[201]

In the Nagoya Protocol, the realisation of the treaty objectives relies greatly on the reciprocal relationship between the provider and user Parties, incentivised by MAT on transferring GR for agreed monetary or non-monetary benefits.[202] However, in parallel to such economic instruments and bilateral approaches, there are collective interests of Parties—the *raison d'être* of biodiversity conservation that provides normative grounds for the ABS framework.[203] Specifically, biodiversity conservation is established by the CBD as a "common concern of humankind"; therefore, the CBD is endowed with obligations that are binding *erga omnes partes* vis-à-vis biodiversity conservation. Because the Nagoya Protocol is to implement the third objective of the CBD—fair and equitable sharing of the benefit arising from the utilisation of genetic resources—and thereby contributing to the conservation of biodiversity and sustainable use of its components, it is also inherently linked to the goal of biodiversity conservation that is the "common concern of humankind". This collective characteristic of obligations under the Nagoya Protocol could be supported by its triggering construction of the compliance mechanism, in which any Party may initiate the procedures with respect to another Party and the Secretariat may submit information for a Committee trigger in defence of the common interest. Thus, I argue that a broader interest in the treaty compliance exists under the international ABS

---

[201] *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75), Inter-American Commission on Human Rights Advisory Opinion* [24 September 1982] (Inter-American Court of Human Rights) IACHR Series A no 2 paras 29 and 30.

[202] For an analysis of economic incentive in environmental law, see Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2011) 46 and Richard B. Stewart, 'Economic Incentives for Environmental Protection: Opportunities and Obstacles' in Richard L. Revesz, Philippe Sands and Richard B. Stewart (eds), *Environmental Law, the Economy and Sustainable Development* (Cambridge University Press 2000) 171.

[203] Cardesa-Salzmann (n 11) 109.

framework rather than just bilateral obligations owed individually as either provider or user Parties. In addition, as demonstrated in the previous chapters, Parties of the Nagoya Protocol also bear intra-State obligations to ensure fair and equitable benefit-sharing of ILCs and that access to their GR and TK are subject to ILCs' PIC.

Thus, arguably, the Nagoya Protocol entails obligations that are similar in nature with some human rights obligations in the sense that they are established for the collective interests of the international community and that an intra-State dimension is included. These obligations could be binding *erga omnes partes* because they have transcend the sphere of bilateral relations of State Parties and are established for wider common interests. In particular, they include obligations that relate directly to conserving biodiversity, for instance, obligations to "create conditions to promote and encourage research which the conservation and sustainable use of biological diversity",[204] to "encourage users and providers to direct benefits…towards the conservations of biological diversity…",[205] and to consider a global multilateral benefit-sharing mechanism.[206] They may also include obligations to regulate access to and benefit-sharing of GR and associated TK,[207] whose potential role to contribute to biodiversity conservation is explicitly recognised in the Preamble of the Nagoya Protocol. Furthermore, it may also include Parties' obligation to ensure fair and equitable benefit-sharing of ILCs who live within their territories, on the basis that FPIC and benefit-sharing are part and parcel of ILCs' fundamental human rights pertaining to their land, resources and culture.[208]

---

[204] Nagoya Protocol, art 8(a).

[205] ibid art 9.

[206] ibid art 10.

[207] ibid arts 5 6 and 7.

[208] For a detailed discussion on the linkages between ABS requirements and fundamental human rights of ILCs, see previous section 3 of chapter two and section 2 of chapter three.

3.2.2 Inter-State litigation

The traditional legal consequence follow such a distinction of bilateral and *erga omnes partes* obligations relates to the right to invoke State responsibility—how a State could be held responsible for a breach of its international obligation. It is an important aspect of nature of States' responsibility, even though, as demonstrated by Birnie and others, judicial remedies are rarely sought in MEAs in practice.[209] The theory of State responsibility was attributed in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles) by the International Law Commission (ILC) in August 2001.[210] For *erga omnes partes* obligations, the ILC Draft Articles provide that any State (injured or not) is entitled to invoke the responsibility of another State if the obligation breached is owed to a group of States including that State and established for the protection of a collective interest of the group.[211] This approach also manifests in the ICJ Statute establishing the procedures, which asserts, "whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states" and "every state party so notified has the right to intervene in the proceedings".[212] According to Crawford's commentary to the Draft Articles, the standard example of such collective obligations are those concerning the environment or security of a region.[213]

In light of the collective nature of human rights obligations, any State may have legal standing to bring proceedings before an international court in cases of violation of *erga omnes* human rights on the ground that the obligations are owed to the international community as a whole. They may also bring proceedings concerning *erga*

[209] Birnie, Boyle and Redgwell (n 34) 238.

[210] UNGA Res 56/83, 'Responsibility of States for Internationally Wrongful Acts ' (28 January 2002) UN Doc A/RES/56/83.

[211] ibid arts 42 and 48.

[212] ICJ Statute, art 63.

[213] UNGA, 'Report of the International Law Commission' (2001) Supp No. 10 UN Doc A/56/10 319.

omnes partes obligations on the ground that the obligations are owed to the particular group of States. Thus, if certain obligations under the international ABS framework could be established as *erga omnes partes* obligations, any State may invoke the responsibility of another State according to the Draft Articles. This possibility would have a significant impact, considering that the CBD has 196 Parties and the Nagoya Protocol has 117 Parties.[214] Having said that, this approach is also limited by the fact that only States, not the individuals or communities whose rights are violated, have standing to invoke State responsibilities in front of international judicial organs, for instance, the ICJ. [215] In addition to the various ways for seeking quasi-judicial remedies at the international level as discussed in the previous section 3.1, there is also extensive scholarly literature on *actio popularis* litigations—to have States defending injured groups by acting on behalf of them and invoke state responsibility of other States within their capabilities.[216] Admittedly, there is a question mark on the practicality and effectiveness of *actio popularis* litigation for both human rights and ABS issues.[217] Fundamentally, inter-State procedure and litigation is not a popular choice for States on international plane. At the time of writing, there have been only 10 inter-State cases

[214] Only two member States of the United Nations are not Parties to the CBD: United States of America and the Holy See, information available at CBD, 'List of Parties' (*CBD*, 1992) <https://www.cbd.int/information/parties.shtml> accessed 03/03/2019.

[215] Only States have access to the ICJ, see ICJ Statute, art 34(1).

[216] Anne-Laure Vaurs-Chamette, 'Peoples and Minority Groups' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 1002, Scott Leckie, 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?' (1988) 10 (2) Human Rights Quarterly, 249 and Alan E. Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2007) 18 (3) Fordham Environmental Law Review, 502. For the criticism on its feasibility in European and Inter-American human rights contexts, see Christian Schall, 'Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?' (2008) 20 (3) Journal of Environmental Law, 452.

[217] See Ludwig Kramer, 'Public Interest Litigation in Environmental Matters before European Courts' (1996) 8 (1) Journal of Environmental Law, 1 and Schall (n 216) 417.

submitted before the European Court of Human Rights,[218] while no inter-State dispute regarding a violation of human rights treaty obligation has ever been referred to a UN treaty body.[219]

Finally, it is necessary to note that the traditional approach to deal with breach of multilateral obligations faces many challenges especially under international environmental law.[220] Nègre has demonstrated that, under the CBD framework, it is difficult to identify States' wrongful acts because damage to biodiversity in many cases is "a product of normal development of lawful activities".[221] Furthermore, in the context of biodiversity loss, the responsible State and the victim State may be both at the same time.[222] As Fitzmaurice has argued, special features of the environment have resulted in particular solutions, applications or rules, but this does not mean in any way that environmental law is separate from the general principles of international law.[223] Thus I argue that even though scholars seem to have agreed to the point that sanctioning a State for its wrongdoings is not as preferable or effective as facilitating States to comply with their obligations in achieving the common objectives,[224] this does not follow that a State would not be held accountable in light of state responsibility if its conduct breaches collective obligations.

---

[218] See ECHR, 'Inter-States Applications' (*ECHR*, 2019) <https://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf> accessed 04/05/19.

[219] See OHCHR, 'Human Rights Bodies - Complaints Procedures' (*OHCHR*, 2019) <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#interstate> accessed 04/05/19.

[220] Jan Klabbers, 'Compliance Procedures' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2008) 1002.

[221] Céline Nègre, 'Responsibility and International Environmental Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 808-809.

[222] ibid.

[223] Malgosia A. Fitzmaurice, 'International Environmental Law as a Special Field' (1994) 25 Netherlands Yearbook of International Law, 183.

[224] Nègre (n 221) 809.

3.2.3 Multilateral accountability in the "softened" compliance mechanism

Legal scholars including Risse-Kappen, Ropp and others have observed a significant change over the past decade in the process by which States and non-State actors comply with their human rights commitments and the ways in which they are held accountable—from the speaking of "wrongful act" to "situations of non-compliance". [225] They argue that a wealth of innovative legal or quasi-legal mechanisms have been developed and utilised to promote compliance of international human rights laws in additional to traditional judicial enforcement. For example, Mégret has demonstrated that both State Parties and human rights judicial bodies are increasingly assigned with the role to monitor each other's behaviour for the *ordre public* and to raise issues of invalidity before the actual dispute takes place.[226] Under the UN system, various mechanisms also oblige State Party to submit treaty-specific reports periodically about their compliance vis-à-vis the nine international human rights treaties and two optional protocols.[227] Furthermore, Jinks and Goodman have pointed out that there is an emerging social approach that aims at creating an accommodating and enabling environment for the realisation of human rights, for instance, human rights capacity-building projects promoted through UN and other public organisations.[228] Overall, the underlying idea echoes the one supporting the facilitative compliance procedures in MEAs: it is perhaps more efficient to prevent

---

[225] Thomas Risse-Kappen and Stephen C. Ropp, 'Introduction and Overview' in Thomas Risse-Kappen and others (eds), *The Persistent Power of Human Rights: from Commitment to Compliance* (Cambridge University Press 2013) 12.

[226] Mégret (n 95) 92.

[227] UN HRI, 'Compliance by States Parties with Their Reporting Obligations to International Human Rights Treaty Bodies' (2 May 2017) UN Doc HRI/MC/2017/2 para 1.

[228] This dimension is more social than legal, based on the recognition of the limits of statehood. See Derek Jinks and Ryan Goodman, 'Social Mechanisms to Promote International Human Rights: Complementary or Contradictory? ' in Thomas Risse-Kappen and others (eds), *The Persistent Power of Human Rights: from Commitment to Compliance* (Cambridge University Press 2013) 104.

violation of rights and address tensions and risks of non-compliance before disputes take place.[229]

Under the CBD and the Nagoya Protocol, compliance is ensured through institutional arrangements, for instance, the COP/the COP-MOP, where *in situ* regime agreements could be negotiated. Cardesa-Salzmann has observed that measures adopted in this context to exercise *erga omnes partes* obligations often aim at facilitating "endogenous enforcement" via non-adversarial and non-confrontational means.[230] Thus, the Nagoya Protocol and human rights law share a course by which multilateral treaty obligations are respected—a "softened" mechanism that is of a facilitative and non-adversarial nature. Inevitably, there are worries that this trend might harm the vigour of international law, dilute its normative force[231] and to the worst, it might not work after all.[232] However, as empirical evidence has demonstrated, the extent to which international human rights laws are complied with, does not only depend on States' commitment and willingness, but also their institutional capacity.[233] In a pragmatic mind-set, it is therefore more probable that compliance mechanisms could yield satisfying results through negotiation and facilitation instead of dispute settlements or judicial remedies, because the former is more capable of accommodating and addressing diverse interests and varying institutional capacities among States. In this line, it is worth noting that under the Nagoya Protocol, the Party-self trigger of a non-compliance issue allows States to submit themselves to international assistance and scrutiny; therefore, provides an alternative way for

[229] See the discussion in the previous section 1.1.

[230] Cardesa-Salzmann (n 11) 105.

[231] Prosper Weill, 'Towards Relative Normativity in International Law?' (1983) 77 (3) American journal of international law, 440.

[232] Martti Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?' (2001) 72 British Yearbook of International Law, 355.

[233] Risse-Kappen and Ropp (n 225) 4.

ensuring multilateral accountability in which States Parties are able to hold themselves accountable.

3.2.4 States' obligation of international cooperation

The relevance of international human rights is also evident in its implications on States' obligations for international cooperation. According to Article 2 of the ICESCR, each State Party needs to "take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means".[234] Elaborating the nature of such obligations, the General Comment No.3 points out that, international cooperation for development and thus for the realisation of relevant human rights is an obligation of all States, which is in particular incumbent upon those States who are in a position to assist others.[235] Indeed, scholars including Skogly and Vandenhole have argued that States shall take responsibility not only towards individuals and groups who live in its jurisdiction, but also towards those from other parts of the world.[236] In April 2018, the UN Special Rapporteur on human rights and the environment John Knox has proposed a series of framework principles on Human Rights and the Environment which highlights States' obligations to cooperate in situations where

[234] International Covenant on Economic, Social and Cultural Rights [adopted 16 December 1966, entered into force 3 January 1976], art 2(1).

[235] CESCR, 'General Comment No. 3: The Nature of States Parties' Obligations' (14 December 1990) UN Doc E/1991/23 para 14.

[236] For an overview see Sigrun Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia 2006) 83. For an analysis of this obligation in the context of Children's right, see Wouter Vandenhole, 'Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development?' (2009) 17 (1) The International Journal of Children's Rights, 26.

environmental issues interferes with the full enjoyment of human rights.[237] Knox emphasises that such obligation "requires States to work together to address transboundary and global threats to human rights", which are explicitly identified in the context of biodiversity conservation.[238] Specifically, States are required to take action according to their capacities but the obligations must be complied by all States in good faith.[239] Notably, "specific protections for Indigenous peoples and those in vulnerable situations" is called upon when States are to comply with their human rights obligations in the context of other international legal frameworks.[240]

Under the Nagoya Protocol, international cooperation is emphasised throughout the text with respect to, *inter alia*, capacities for sustainable development,[241] transboundary ABS issues,[242] compliance,[243] capacity-building for implementing the Protocol especially in developing countries[244] and benefit-sharing.[245] One example of inter-State cooperation that is being increasingly implemented is the domestic compliance measures, as has been demonstrated in light of ensuring the inter-operability of the ABS rules of the Nagoya Protocol.[246] Thus, it is clear that States bear responsibilities to cooperate with one another through appropriate means, not only as a human rights principle, but also as treaty obligation under the Nagoya Protocol. Knox's articulation on States' responsibility for

---

[237] Human Rights Council, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (24 January 2018) UN Doc A/HRC/37/59 15.

[238] ibid para 36.

[239] ibid paras 37 and 38.

[240] ibid para 39.

[241] Nagoya Protocol, pmbl.

[242] ibid art 11.

[243] ibid arts 15 and 16.

[244] ibid art 22.

[245] ibid anx.

[246] See the discussions in the previous section 2.1.

international cooperation also paves the way to consider the interconnection between human rights and the Nagoya Protocol, using Article 2 of the ICESCR as a legal basis. However, more work is needed to clarify how human rights norms apply to specific ABS cases and to what extent the obligation to cooperate can be realised in both areas of laws while taking into account the requirements of another.

3.2.5 Human rights implications

To approach the issue of compliance from an inter-State perspective, the above analysis demonstrated that there are possibilities of ensuring States' compliance via inter-State litigation based on the claim of breaching *erga omnes partes* obligations and multilateral accountability under the compliance mechanisms. I argued that a broader interest in treaty compliance is evident under the international ABS framework and that obligations relating directly to biodiversity conservation and protection of IPLCs' rights could be constructed as obligations that are binding *erga omnes partes.* Thus, both frameworks entail obligations that are established for the collective interests and include an important aspect of intra-State obligations towards individual and groups who live within States. This argument contributes to the mutually supportive interpretation of the Nagoya Protocol and international human rights.

In the context of inter-State litigation, I demonstrated that there is a possibility that States could invoke the responsibility of any other State for a breach of fair and equitable benefits-sharing – as an *erga omnes partes* obligation – before international judicial organs. States could also argue that these ABS obligations are established as human rights obligations or inherently link to human rights issues. With a sharpened focus on IPLCs, since they do not have legal standing to bring proceedings before the ICJ, I have also discussed the possibility of *actio popularis* litigations—to have States defending injured groups by acting on behalf of them and invoke state responsibility

of other States. In a positive light, the fact that the CBD and its Nagoya Protocol have a large number of Parties could enhance the practicality of inter-State litigation. However, I also cautioned that there are significant challenges embedded in this traditional adversarial approach to deal with breach of multilateral obligations especially in international environmental contexts. The fact that inter-State procedure and litigation have rarely been sought shall also not be overlooked.

Under human rights law and the Nagoya Protocol, a "softened" mechanism that is of a facilitative and non-adversarial nature is gaining popularity over confrontational enforcement measures. The rationale for this phenomenon is based on the premise that it is perhaps more efficient to prevent violation of rights and address tensions and risks of non-compliance via facilitating States to comply with their international obligations rather than speaking of wrongful act and relying on judicial enforcement. I also discussed the relevance of the human rights obligation of State to cooperate, which is evinced in a number of international human rights instruments as well as the Nagoya Protocol. I argue that the fulfilment of this obligation may encourage some optimistic changes in respecting IPLCs' ABS rights and human rights, as already manifest in the process of implementing the domestic compliance measures for ensuring the "inter-operability" of the ABS framework. Nevertheless, this is an area that has been largely neglected by international legal scholars and further research is necessary on how and to what extent human rights norms on the obligation to cooperate can be realised in both areas of laws while taking into account the requirements of another.

4. Conclusion

This chapter offers an original examination of the international compliance mechanism and domestic compliance measures of the Nagoya Protocol. It highlights the

opportunities and challenges embedded in the process of their interpretation and implementation vis-à-vis IPLCs. As discussed, the international compliance mechanism of the Nagoya Protocol provides an important avenue where non-adversarial, non-confrontational and facilitative measures are adopted to promote and encourage Parties' compliance and to address cases of non-compliance. With a sharpened focus on ILCs, an indirect trigger of the compliance procedures of the Nagoya Protocol is present as "directly affected ILCs" could submit information about non-compliance to the Compliance Committee. This is significant because it increases the level of participation of ILCs in the compliance mechanism of the Nagoya Protocol, and meanwhile expands the Committee's function from, traditionally, only addressing non-compliance between Parties, to monitor and address Parties' compliance with their obligations vis-à-vis ILCs. These two characteristics are unprecedented in any other environmental treaties at the time of writing. With respect to domestic compliance measures, Articles 15-18 of the Nagoya Protocol explicitly impose obligations on Parties to regulate user compliance with domestic procedural ABS requirements, including ILCs' PIC and MAT, and to ensure ILCs' rights of access to justice. Although a certain level of protection is established for ILCs and their TK, I argued that relying solely on domestic ABS legislative authority to address GR and TK renders too much discretion to State governments and risks the potential of aggravating the persisting power asymmetries between ILCs and State authorities. In both contexts, I highlighted the relevance of international human rights standards and suggested that to interpret and implement ABS obligation in light of relevant human rights law might be helpful to address the cross-cutting issues with respect to Parties' intra-State obligation owed towards ILCs as well as interpretative ambiguities of the ABS rules of the Nagoya Protocol.

This chapter unpacked the human rights implications on compliance-related provisions of the Nagoya Protocol from two perspectives: the IPLCs' human right of

access to justice and an inter-State perspective through the lens of State Parties' obligations. The human right of access to justice is essential for substantiating and enforcing IPLCs' fundamental human rights and also helpful to elaborate the opportunities and risks embedded in understanding Parties' obligation of ensuring access to justice of IPLCs under the Nagoya Protocol. I demonstrated that the human rights norm of access to justice could contribute to clarifying Parties' ABS obligations that they are obliged to effectively facilitate access to justice for IPLCs to courts, tribunals and other non-judicial remedies. Meanwhile, I explored the possible ways for realising the right of access to justice at both international and domestic levels, including regional human rights courts, international treaty bodies, ICJ and its advisory opinions and domestic tribunals. Their relevance and the practicality for IPLCs to seek a remedy for violations of their ABS rights depend on the legal recognition of IPLCs' human rights and is limited by a range of administrative factors, such as standing and admissibility.

From an inter-State perspective, I demonstrated the possibilities of ensuring States' compliance via inter-State litigation based on the claim of breaching *erga omnes partes* obligations and multilateral accountability under the compliance mechanisms. This is based on the observation that obligations relating directly to biodiversity conservation and protection of IPLCs' rights have indeed transcended the sphere of bilateral relations of the State Parties. These obligations are established for the wider common interests of States; therefore, are binding *erga omnes partes*. Specifically, I examined the possibilities where States could invoke the responsibility of any other State for a breach of fair and equitable benefits-sharing—as an *erga omnes partes* obligation—before international judicial organs, or defend injured groups by acting on their behalf—*actio popularis* litigations. These options remain possible but have rarely been carried out. Furthermore, I observed a shared trend of favouring a "softened" mechanism that is of a facilitative and non-adversarial nature in both human

rights law and the Nagoya Protocol. Indeed, this approach might be more efficient to prevent non-compliance via facilitation rather than confrontational measures and judicial enforcement.

A mutually supportive interpretation could attribute greater legal significance to the ABS principles and standards of the Nagoya Protocol by enhancing its relevance and enforceability at both international and domestic levels. In turn, the accelerated progress of implementing ABS compliance measures and new opportunities for strengthening IPLCs' participation in the context of compliance could also contribute to better realising IPLCs' human rights of access to justice and safeguarding many other fundamental rights with respect to their lands, natural resources and culture. Finally, I suggested that further research is needed in order to fully unravel the potential of interpreting and implementing the Nagoya Protocol in light of human rights standards. For example, it is worth asking how court systems and quasi-judicial mechanisms could be directed and designed to promote equal and affordable accessibility to justice, and what the role and function of IPLCs' customary laws and community protocols is in the context of compliance.

Chapter Five

Conclusion

This research project has sought to provide a pragmatic account of how the Nagoya Protocol could be interpreted and implemented in light of international human rights law based on the principle of systemic integration and mutual supportiveness of international law. It has contributed a timely and thorough scrutiny of the Nagoya Protocol and its current implementation with a primary focus on Indigenous peoples and local communities (IPLCs). It has articulated the extent to which the human rights of IPLCs may be applicable in the access and benefit-sharing (ABS) context of the Nagoya Protocol and how these two branches of international law may complement each other in realising their respective objectives, developing what is currently very minimal literature on the exact application of the principle of mutual supportiveness at the interface between international environmental law and human rights law. This final chapter discusses the key findings of this thesis and their relevance, in response to the research questions set out in chapter one. It also suggests some potential avenues for further research.

1. Key findings and their relevance

1.1 What are, and what are the purpose of, the principles of systemic integration and mutual supportiveness?

The principles of systemic integration and mutual supportiveness are emerging principles that guide the interpretation and implementation of international law. Their legal implications and scope remain an unsettled debate for international legal scholars, judges and lawyers. However, as discussed in chapter one, it has become a regular

occurrence on international fora that different branches of international law should be interpreted and implemented in a systemic and mutually supportive manner, especially in between the fields concerning trade and environment protection, biodiversity conservation, sustainable development and human rights. It is clear from the literature that the questions of systemic integration and mutual supportiveness have a doctrinal dimension on solving potentially conflicting legal norms or harmonising the "fragmented" international law.[1] Nevertheless, they speak beyond merely doctrinal matters—as demonstrated in the thesis, the principle could also shed light on addressing practical challenges in interpreting and implementing treaty norms and standard setting at both international and domestic levels. Much has been written about how international trade law should be mutually supportive with environmental law, or how international law-making on intellectual property rights (IPRs) should consider and address the issue of traditional knowledge (TK).[2] In contrast, the interface between international environmental law and international human rights law remains an under-studied field. This is in particular the case with IPLCs, whose cultural integrity and ways of life rely on the natural environment yet whose fundamental human rights relating to lands and resources are consistently under threat. Thus, the point of departure is, as Fitzmaurice has argued, "special features of the environment have resulted in particular solutions, applications or rules, but this does not mean in any way that environmental law is separate from the general principles of international law".[3]

---

[1] Riccardo Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?' (2010) 21 (3) European Journal Of International Law, 661 and ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682 8.

[2] Pavoni (n 1) 661, Graham Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge* (Earthscan 2004) 3, Peter Drahos, *Intellectual Property, Indigenous People and their Knowledge* (Cambridge University Press 2014) 108 and Johanna Gibson, *Community Resources: Intellectual Property, International Trade, and Protection of Traditional Knowledge* (Routledge 2016) 185.

[3] Malgosia A. Fitzmaurice, 'International Environmental Law as a Special Field' (1994) 25 Netherlands Yearbook of International Law, 183.

For this thesis, the multifaceted challenges facing global biodiversity conservation and fair and equitable benefit-sharing with IPLCs determine that the Convention on Biological Diversity (CBD) and its Nagoya Protocol cannot be interpreted and implemented in isolation from international human rights standards.

1.2 What are the strengths and limitations of the Nagoya Protocol in protecting IPLCs' rights?

This question is dealt with in chapters two to four under the theme of access, benefit-sharing and compliance respectively. In general, I observed that the Nagoya Protocol envisages a comprehensive set of obligations for State Parties to ensure fair and equitable benefit-sharing with IPLCs. Specifically, chapter two articulated State Parties' responsibilities to ensure GR and TK held by IPLCs are obtained with their prior informed consent (PIC) and in accordance with their customary laws and community protocols. Chapter three looked into the requirements of benefit-sharing that fair and equitable terms (often as contractual terms) of benefit-sharing must be negotiated with IPLCs and State Parties are obliged to facilitate IPLCs in this process through means such as capacity-building so that the negotiation is also on a fair and equitable basis. [4] As demonstrated in chapter four, the Nagoya Protocol unprecedentedly includes IPLCs in its international compliance mechanism and provides them with an "indirect trigger" of the compliance procedures through the Compliance Committee, which is traditionally only available for State Parties. In reality, the Nagoya Protocol is facilitating a normative shift as States commit themselves to ABS principles and undertake legislative and policy duties to transpose ABS rules into their domestic systems. Consequentially, practices of access to and utilisation of IPLCs' GR and TK are subject to specific procedures and substantive

[4] These requirements have been articulated through various voluntary guidelines adopted by the COP decisions. See the discussion in section 1.4.1 of chapter three.

requirements. Against this background, the Nagoya Protocol contributes to safeguarding IPLC's rights pertaining to their natural resources and knowledge, as well as to their customary laws and thus cultural integrity.

However, as have been discussed throughout the chapters, there persist interpretative ambiguity and practical challenges in applying the Nagoya Protocol at both the international and domestic levels. Legal uncertainty is often a result of different possibilities of interpreting the operative provisions, especially with the frequently used qualifiers such as "as appropriate", "with the aim of ensuring" and "in accordance with domestic law". As discussed in chapter two, this deliberate flexibility for States' interpretation and implementation reflects the principle recognised in the CBD and the Nagoya Protocol that States have sovereign rights over their natural resources thus the authority to determine how their GR may be accessed, what benefit should be shared and under what condition. However, I argued that this approach poses risk of undermining IPLCs' rights over their GR and TK, as it suggests that IPLCs' rights are subsidiary to domestic recognition. Therefore, the fundamental limitation of the Nagoya Protocol is embedded in the risk that IPLCs' ABS rights might be neglected or rejected if they live in countries where there is no applicable ABS rules or no legal recognition of their status as holder of GR and TK. Allowing too much discretion on State governments, as argued in chapter four, might aggravate the persisting power asymmetry among IPLCs, State authorities and multinational corporations. It would put IPLCs in a vulnerable and passive position to fully participate in the ABS process or claim fair and equitable benefit-sharing.

1.3 What are the relevant human rights of IPLCs in the ABS context and what are their implications on States' obligations vis-à-vis IPLCs?

The Nagoya Protocol concerns GR and TK; therefore, its ABS principles and rules interlink and interact with human rights norms regulating lands and natural resources, intellectual property, as well as issues of Indigenous and traditional ownership over such resources and knowledge, and more broadly their cultural identities and ways of life. In chapters two to four, I surveyed substantive human rights of IPLCs of self-determination, equality and non-discrimination, property, development, culture and access to justice, as well as procedural human rights of free, prior, informed consent (FPIC), consultation, impact assessment and those pertaining to their customary laws. The discussion of the relevance of these human rights to ABS has been situated in the contexts of access, benefit-sharing and compliance, but it is clear that these rights of IPLCs are intrinsically intertwined and inseparable. In fact, the contemporary international human rights law has become the dominant rubric for pursuing the rights of IPLCs and shaping States' obligations,[5] even though the normative grounds, nature and contents of these rights still face controversies. International human rights law imposes obligations on States to respect, protect and fulfil IPLCs' human rights. The principle of systemic integration and mutual supportiveness requires these obligations to be fulfilled in all circumstances, including when interpreting and implementing the CBD and the Nagoya Protocol. Specifically, in chapter two, I argued that the principle of States' sovereign rights over natural resources is neither absolute nor unconditional but takes shape as a human rights obligation, as required by the right of internal self-determination, to exercise States' sovereign rights for promoting national development and well-being of all its peoples. Evident in an expansive body of judicial and quasi-

[5] See the discussion of the history and contemporary development of international law with respect to IPLCs in section 2.1.2 of chapter one. Also see S. James Anaya, *Indigenous Peoples in International Law* (Second edn, Oxford University Press 2004) 66 and Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press 2010) 46.

judicial practices, States are also required to fulfil IPLCs' participatory rights by ensuring FPIC and consultations before granting concession to projects that might affect IPLCs' rights.[6] In chapter three, I argued that the normative standards of fairness and equity under the CBD and its Nagoya Protocol are akin to equality and non-discrimination as established in human rights law, which implies that States should eliminate any discriminatory measures and to ensure *de jure* equality in order to achieve fair outcome. The property rights of IPLCs to their lands, territories, natural resources and TK also speak to States obligations of ensuring benefit-sharing—a linkage that has been increasingly substantiated by regional human rights courts.[7] In the context of compliance, States' obligation to respect IPLCs' right of access to justice could strengthen the ABS obligation as envisaged in Article 18 of the Nagoya Protocol that States should endeavour to develop legislative and administrative means to facilitate access to justice for IPLCs to courts, tribunals and other non-judicial remedies.

1.4 Can Nagoya Protocol and human rights be mutually supportive in protecting the rights of IPLCs?

Higgins has suggested that international law should be perceived as "a normative system and a process rather than as rules".[8] This perception of international law lays the cornerstone for the premise that the Nagoya Protocol should not be interpreted or implemented in isolation from international human rights law. As discussed in chapter one, Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) provides key criteria of applying the principle of systemic integration in the process of treaty interpretation. Specifically, to establish what the "relevant rules" are and to which "Parties" the relevant rules may apply, have proved to be the key issues that

[6] See the discussion in section 2.2 of chapter two.

[7] See the discussion about case law in section 2.3.2 of chapter three.

[8] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 8.

need to be addressed in adopting the principle of systemic interpretation. The value of a broad and inclusive approach to determine these key terms is discussed in chapter one, although the extent to which this principle has been adopted by international tribunals is indeed rather inconsistent. In terms of the principle of mutual supportiveness, its implications in both interpretative and law-making dimensions are attracting more and more scholarly attention with a positive potential in guiding the law-making process in international law.[9] As discussed, the impacts of this principle manifest in the current negotiating processing of revising the TRIPS Agreement so that its rules on the patentability of GR and TK is in accordance with the ABS requirements under the CBD and the Nagoya Protocol. In light of a broad understanding of the principles of systemic integration and mutual supportiveness, human rights principles and standards that concern IPLCs are relevant rules not only Parties of the Nagoya Protocol, but also Parties of the CBD; because it is an integral and imperative part of the contemporary international legal system.[10] Parties of the Nagoya Protocol need to take into account their human rights obligations also because a treaty needs to be interpreted "in good faith".[11] The analysis of specific human rights in the chapters two to four showed that the exact application of the relevant human rights rules may vary from case to case. [12]

In practice, the extent to which the ABS rules may be complementary with IPLCs' human rights is influenced by the political willingness of Parties to endorse the implications of international human rights law in an ABS context. As discussed in chapter three, IPLCs' representatives have long fought for explicit and comprehensive

[9] Pavoni (n 1) 655.

[10] Manfred Nowak, *Introduction to the International Human Rights Regime* (Nijhoff 2003) 9.

[11] Vienna Convention on the Law of Treaties [adopted 23 May 1969, entered into force 27 January 1980] 1155 UNTS 331, art 31(1).

[12] For instance, the different approach to determining the applicable rules in the 1998 *US-Shrimp* case and the 2006 *EC-Biotech* case, see discussion in section 2.2.2 of chapter one.

recognition of IPLCs' human rights under the CBD framework. In response, State governments only begin to do so rather recently, while making considerable legal and technical reservations. [13] Meanwhile, the judicial interpretation of a mutually supportive interpretation of States' obligations imposed by international human rights law and environmental law may support the integration of the human rights of IPLCs into interpreting and implementing the Nagoya Protocol. Specifically, in the remarkable *Kaliña and Lokono* case, the Inter-American Court of Human Right cross-referenced States' obligations under the CBD to support its interpretation of human rights and highlighted the relevance of the Nagoya Protocol, even though the State concerned was not a Party to the Protocol. This kind of judicial practice upholds the value and feasibility of a mutually supportive interpretation, underpinned by the rationale that ABS rights are part and parcel of human rights of IPLCs.

1.5 What are the normative and practical implications of the principles of systemic integration and mutual supportiveness?

This question is central to the thesis's contribution. Chapters two to four have approached it from two perspectives, asking how human rights may complement the interpretation and implementation of the Nagoya Protocol and *vice versa*. Looking at the Nagoya Protocol through the prism of human rights, I argued that the integration of international human rights could strengthen the normative ground and procedural significance of the ABS rules and mechanisms of the Nagoya Protocol. In particular, chapters two and three identified that substantive human rights, such as the property rights of IPLCs towards their lands and resources, could provide a much stronger normative ground for imposing procedural obligations on States such as consultation, FPIC and benefit-sharing. For instance, in the context of intra-State benefit-sharing

[13] CBD COP Decision XII/12, 'Article 8(j) and related Provisions' (13 October 2014) UN Doc UNEP/CBD/COP/DEC/XII/12 sec F. See the discussion in section 1.2.2 of chapter three.

with IPLCs, such obligations mean that States need to take positive measures to recognise the customary laws of IPLCs in controlling and using their natural resources and TK, as well as their perception of fairness and equity in benefit-sharing terms. Furthermore, I demonstrated on various occasions that the human rights standards could invalidate the narrow reading of the Nagoya Protocol and limit States Parties' discretion to interpret and implement the ABS provisions according to their own political preferences or legislative conveniences. For instance, the human rights standards on FPIC could invalidate the narrow reading of Article 6 on PIC in the sense that IPLCs' rights to grant FPIC is not just an extrinsic normative creation by States, but an intrinsic right derived from the identity of such peoples and communities.[14] In addition, I argued that international human rights principles and standards could help to set the benchmark for interpreting and implementing the ABS rules of the Nagoya Protocol, especially when they overlap and/or conflict with human rights requirements or remain implicit.[15] For example, the human rights principle of non-discrimination and equality requires gender equality, as well as equal and fair treatment of those vulnerable to discriminatory and unfair customary rules within IPLCs--issues touched upon by the Protocol but remain ambiguous.[16] Finally, with respect to access to justice, chapter four surveyed the possibilities where IPLCs could rely on human rights mechanisms to seek remedies for violations of their ABS rights. Under jurisdictions where procedural requirements such as FPIC and benefit-sharing have been explicitly recognised as integral safeguards for realising IPLCs' human rights, there is indeed an

[14] See the discussion in section 3.2.4 of chapter two.

[15] Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (2016) 27 (2) European Journal Of International Law, 355.

[16] See the discussion on gender inequality that might be embodied in IPLCs' traditional practices and customs in section 2.1 of chapter three. See also, Susan Moller Okin, 'Feminism and Multiculturalism: Some Tensions' (1998) 108 (4) Ethics, 664 and *Sandra Lovelace v Canada* [30 July 1981] (HRC) UN Doc. CCPR/C/13/D/24/1977 166.

opportunity for IPLCs to bring ABS claims to human rights judicial bodies and seek for domestic enforcement.[17]

In terms of how the ongoing process of interpreting and implementing the Nagoya Protocol may contribute to human rights law, I argued that the ongoing international and domestic implementation of the Nagoya Protocol could help to contextualise the realisation of IPLCs' human rights and give teeth to international human rights law. Specifically, it could provide particular contexts, timely normative guidance and practical evidence on how to transpose human rights standards into feasible agendas of States governments and private entities with respect to utilising GR and TK and fair and equitable benefit-sharing. For instance, the detailed procedural guidance for negotiating and implementing benefit-sharing terms in accordance with IPLCs' customary laws could complement the realisation of IPLCs' right to lands and resources, development and culture. Furthermore, the Nagoya Protocol bears great potential to inform the jurisprudential interpretations of international human rights norms, as well as the development of new human rights instruments and standards, especially with respect to IPLCs.[18] The ABS rules of the Nagoya Protocol also could help to expand the focus of traditional human rights mechanisms from coercion and infringement of States vis-à-vis IPLCs, to the emerging tension between IPLCs and powerful multinational companies.[19] In addition, State Parties could demonstrate their compliance with human rights obligations by acting in accordance with ABS laws, for instance, to recognise ILCs' customary laws and to ensure consultation, FPIC and

[17] For instance, under the jurisdiction of the Human Right Committee, the Inter-America Court of Human Right and the African Commission on Human and Peoples' Rights, see the discussion in section 3.1 of chapter four.

[18] See various case law discussed in chapters two to four and the normative developments under the international human rights law. See also, Elisa Morgera, 'Under the Radar: Fair and Equitable Benefit-sharing and the Human Rights of Indigenous Peoples and Local Communities related to Natural Resources' (2019) (Online) International Journal of Human Rights, 4.

[19] Jacob Katz Cogan, 'The Regulatory Turn in International Law' (2011) 52 (2) Harvard international law journal, 321.

benefit-sharing. Finally, I argued that the domestic implementation of the Nagoya Protocol, especially by making them applicable in national courts, could render substantive power to not only ABS principles and standards, but also relevant human rights of IPLCs. For instance, among emerging national ABS legislation and policies, many EU countries such as the Netherlands, France and Germany, have incorporated ABS compliance rules into their national civil and criminal laws; therefore, made the norms of the Nagoya Protocol domestically judiciable and enforceable. Such domestic implementation could give teeth to the internationally recognised human rights values and principles, especially of those "soft" human rights instrument like UNDRIP.

Thus, a mutually supportive interpretation could contribute to alleviating the potential clash of cultures, national policies, enforcement strategies and normative conflicts, generated from the multilateral law-making processes and the varying degrees of national implementation. The principle of mutual supportiveness is therefore essential for achieving the respective goals of international legal frameworks and harmonising the common principles and procedural requirements in protecting IPLCs' rights over their lands, territories, natural resources and TK.

1.6 What are the limitations of applying the principles of systemic integration and mutual supportiveness in bridging the gaps between the Nagoya Protocol and the international human rights law?

This question is necessary because the principles of systemic integration and mutual supportiveness need to be appraised critically. As discussed in chapter four, in general, factors including the ambiguity of treaty language, States' lack of capacity and/or willingness to comply with their obligations and the time lags between a State's commitment and performance, might limit or undermine mutually supportive

interpretation and implementation.[20] There is also limitation on forming a perspective of the potential synergies between international environmental law and human rights law relying on the "soft" law instruments—declarations, voluntary guidelines and decisions adopted by the CBD Parties, and views issued by quasi-judicial bodies such as the UN human rights treaty bodies, because they are not of a binding force for States.[21] Furthermore, the value of systematic integration and mutual supportiveness might be questioned by scholars who request empirical data to demonstrate the actual effectiveness of a treaty regime.[22] It is true that these are all valid criticisms and each of them merits a further inquiry into topics concerning, for instance, the status and significance of "soft" international law[23] and the exact approach taken at the domestic level by courts and tribunals towards international binding and non-binding norms, and the methods to evaluate the performance of International norms in national and local contexts.[24] These questions could be pursued in future research.

2. Further research

During the course of this research, I have touched upon several issues but due to the scope and the focus of this thesis, I did not discuss them in detail. This section thus

---

[20] Abram Chayes and Antonia H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1998) 15 and Abram Chayes and Antonia H. Chayes, 'On Compliance' (1993) 47 (2) International Organization, 175.

[21] See conclusions in Christof H. Heyns and Frans Viljoen (eds), *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (Martinus Nijhoff Publishers 2002) 31 and James Crawford, 'The UN Human Rights Treaty System: A System in Crisis?' in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000) 2.

[22] See in general, Oona A. Hathaway, 'Do Human Rights Treaties Make A Difference?' (2002) 111 (8) Yale Law Journal, 2020, Ryan Goodman and Derek Jinks, 'Measuring the Effects of Human Rights Treaties' (2003) 14 (1) European Journal Of International Law, 172 and Oona A. Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (2007) 51 (4) Journal of Conflict Resolution, 588.

[23] Alan E. Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 210.

[24] See essays in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016) 1.

aims to highlight the relevance of these issues for further research. There are three key avenues of interests.

The first avenue is the question about human rights obligations of non-State actors, especially those of multinational corporations. On a few occasions, I mentioned the important role of multinational corporations in the ABS processes, not only in obtaining FPIC from IPLCs or State authorities and establishing fair and equitable benefit-sharing terms, but also in ensuring compliance with the ABS rules of the Nagoya Protocol.[25] In international human rights discourse, the literature on an extension of human rights responsibilities from States to non-State actors is growing, especially based on the recognition of the increasing power and influence of multinational corporations in international economic and social affairs.[26] A number of initiatives at the UN level has emerged, including the UN's Global Compact,[27] and the international process of standard setting vis-à-vis business and human rights is accelerating.[28] For instance, under the auspices of the Human Rights Council, the Guiding Principles on Business and Human Rights for implementing the UN's

[25] See the discussion in section 1.3 of chapter three and section 2 of chapter four. Also see Edith B. Weiss and Harold K. Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press 1998) 545.

[26] Peter T. Muchlinski, 'Human Rights and Multinationals: Is there a Problem?' (2001) 77 (1) International Affairs, 31, Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 195, John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 (4) American journal of international law, 819 and essays in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 1.

[27] See Jennifer Clapp, 'Global Environmental Governance for Corporate Responsibility and Accountability' (2005) 5 (3) Global Environmental Politics, 23 and Stefan Fritsch, 'The UN Global Compact and the Global Governance of Corporate Social Responsibility: Complex Multilateralism for a More Human Globalisation?' (2008) 22 (1) Global Society, 1.

[28] Jordan J. Paust, 'Human Rights Responsibilities of Private Corporations' (2002) 35 (3) Vanderbilt Journal of Transnational Law, 802 and Denis G. Arnold, 'Corporations and Human Rights Obligations' (2016) 1 (2) Business and Human Rights Journal, 267.

"Protect, Respect and Remedy" Framework was adopted in 2011[29] and the zero draft of a legally binding instrument addressing business and human rights was released in July 2018.[30] However, the content and nature of corporations' human rights obligations are still subject to intense debate.[31] Continuing in the light of systemic integration and mutual supportiveness, this raises the question of how the responsibility of multinational corporations might be addressed at the interface of international human rights law and international environmental law when the core business practices of the corporation concern exploitation of natural resources, especially those conducted on IPLCs' lands and territories.[32] Considering the fact that multinational corporations possess the resources to be capable of both being "evil" (e.g. causing environmental harm) and "good" (e.g. contributing to sustainable development), it is worthwhile to pursue, how the intricacies of establishing and elaborating corporations' responsibility to respect the human rights of IPLCs may inform the debate about the accountability of multinational corporations in international environmental law.[33] Again, the Nagoya Protocol could be a good

[29] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31 anx.

[30] The Human Rights Council created an Intergovernmental Working Group to elaborate a "legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises" in 2014. See Human Rights Council, 'Res 26/9 Elaboration of An International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (14 July 2014) UN Doc A/HRC/RES/26/9 para 1 and Human Rights Council, *Zero Draft 16.7.2018*)https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> accessed 16/07/2019.

[31] See essays in Philip Alston (ed), *Non-state Actors and Human Rights* (Oxford University Press 2005) 203, Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 (4) Modern Law Review, 598 and Arnold (n 28) 267.

[32] For an overview of the cross-fertilisation between international human rights and biodiversity law with regard to business responsibility to respect the human rights in the context of ABS, see Morgera (n 18) 22.

[33] André Nollkaemper, 'Responsibility of Transnational Corporations in International Environmental Law: Three Perspectives' in Gerd Winter (ed), *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law* (Cambridge University Press 2006) 179 and Jennifer A. Zerk, *Multinationals and*

example for this work because of the various ways in which its ABS rules envisage the responsibility of private entities and the integration of private law in ensuring compliance with treaty norms, for instance, the use of mutually agreed terms (MAT) for negotiating and ensuring benefit-sharing.[34] In any event, we have seen how the requirements of international environmental law and human rights law intertwine with each other. The responsibilities of multinational corporations to exercise due diligence vis-à-vis human rights in the ABS context may be a useful avenue to bridge these two branches of international law from another perspective.

Furthermore, I set out at the beginning of the thesis that this research aims to provide a pragmatic account of treaty interpretation rather than a theoretical reflection. The question of theory, however, is an important means of furthering the understanding of systemic integration and mutual supportiveness. Different theoretical accounts of international law provide diverse answers to what international law is, and consequentially, how its interpretation may be guided by the principle of systemic integration and mutual supportiveness.[35] A further research in this direction may help to reconcile the increasingly fragmented discipline of international law—with "general principles" encompassing issues such as the sources of law, jurisdiction and States' responsibility, and "fields of application" including international trade, environment and human rights.[36] A theoretical account of systemic integration and mutual supportiveness may also have important implications for protecting IPLCs, as their

Corporate Social Responsibility: Limitations and Opportunities in International Law (Cambridge University Press 2006) 198.

[34] See the discussion in section 1.3.2 of chapter three.

[35] Boyle and Chinkin (n 23) 10.

[36] See the discussion in section 2.2 of chapter one about the fragmentation of international law. Also see Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 (3) Leiden Journal of International Law, 554 and essays in Margaret A. Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012) 21.

rights are formulated differently under different theoretical frameworks.[37] This point has already been touched upon in chapter two as it discusses the question of the legal status of IPLCs' customary laws and community protocols. In light of legal pluralism, the essential question is to what extent IPLCs may be recognised as norm generating subjects and how their customary laws intersect with national laws established by State authorities.[38] As demonstrated, an interpretation of the Nagoya Protocol could not provide an answer to this question, although its requirement to recognise IPLCs' customary laws in the ABS transactions may provide evidence of the Nagoya Protocol supporting the premises of the theory of legal pluralism.[39] In general, the findings of this thesis could feed back into the theoretical debate about systemic integration and mutual supportiveness of international law, and more broadly, to the contemporary development of international law-making.

Last but not the least, building on the analysis of the issue of gender equality in the context of the Nagoya Protocol,[40] a salient point that could be developed further is how to integrate the human rights protection of women into the broader context of international environmental law. The literature has shown that the exclusion of women in decision-making on environmental matters and property ownership is strikingly common in many domestic and local contexts.[41] Yet the plight of women in a world

---

[37] For instance, the Third World and the feminist approaches to international law, see Obiora Chinedu Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective' (2005) 43 (1 2) Osgoode Hall Law Journal, 171, Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93 (2) American journal of international law, 380 and Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000) 1.

[38] Roderick Macdonald and Martha-Marie Kleinhans, 'What is a Critical Legal Pluralism?' (1997) 12 (2) Canadian Journal of Law and Society, 34.

[39] See discussion in section 2.3 of chapter two.

[40] See the discussion about how the Nagoya Protocol addresses women of ILCs in the ABS context in the previous section 2.1.2 of chapter three.

[41] Patricia Kameri-Mbote, 'Law, Gender and Environmental resources: Women's Access to Environmental Justice in East Africa' in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (Cambridge

facing fast environmental degradation has not attracted much attention from international lawyers.[42] How may international law be constructed to protect both women and environment sufficiently? How can we reconcile the norms of gender equality at the intersection of IPLCs' customary laws, national laws and international standards? What should be the responsibility of States and multinational corporations in promoting gender equality especially in an environmental context?[43] These questions link to the previous two avenues of interests and merit further research.

3. Final remarks

In answering the research questions this thesis has provided an original analysis of the human rights implications of the interpretation and implementation of the Nagoya Protocol. It contributes to furthering scholarly research on the interplay between the environmental law and the human rights law, articulating the exact application of the principle of systemic integration and mutual supportiveness. The focus of this research project has been Indigenous peoples, minorities, local communities and women within these often-marginalised groups. The aim has been to identify the ways in which their fundamental human rights could be fully respected in the ABS context of the Nagoya Protocol and the ways in which State Parties could fulfil their ABS obligations in

University Press 2009) 399 and Lorenzo Cotula, *Gender and Law: Women's Rights in Agriculture* (UNFAO 2006) 21.

[42] See Christopher C. Joyner and George E. Little, 'It's Not Nice to Fool Mother Nature: The Mystique of Feminist Approaches to International Environmental Law' (1996) 14 (2) Boston University International Law Journal, 228 and essays in Irene Dankelman (ed), *Gender and Climate Change: An Introduction* (Earthscan 2010) 1.

[43] The issue of gender equality and women's rights has been addressed in the 2030 Agenda for Sustainable Development, especially through the gender-specific Goal 5 among other Sustainable Development Goals (SDGs). This might be a potential entry point to consider the human rights obligations of States and other non-State actors in protecting women in an environmental context. See Shahra Razavi, 'The 2030 Agenda: Challenges of Implementation to Attain Gender Equality and Women's Rights' (2016) 24 (1) Gender & Development, 25 and Valeria Esquivel and Caroline Sweetman, 'Gender and the Sustainable Development Goals' (2016) 24 (1) Gender & Development, 1.

accordance with international human rights principles and standards. This thesis is relevant for structuring an interpretation of the Nagoya Protocol in accordance with international human rights law in order to address the multifaceted challenges facing IPLCs nowadays. It could also provide jurists, domestic legislators, human rights practitioners and NGOs with a more coherent and holistic view for interpreting and implementing the Nagoya Protocol and human rights law vis-à-vis IPLCs. Essentially, it contributes a pragmatic legal account of the principle of systemic integration and mutual supportiveness for realising the original and primary objectives of the international environmental law and human rights law—a clean, safe, healthy and sustainable environment in which human dignity, justice, fairness and equity are respected and pursued for all peoples.

Bibliography

1. Books

Åhrén M, *Indigenous Peoples' Status in the International Legal System* (First edition.. edn, Oxford University Press 2016).

Allen S and Xanthaki A (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart 2011).

Alston P and Goodman R, *International Human Rights: The Successor to International Human Rights in Context* (Oxford University Press 2013).

Anaya SJ, *Indigenous Peoples in International Law* (Second edn, Oxford University Press 2004).

Anaya SJ, *International Human Rights and Indigenous Peoples* (Aspen Publishers 2009).

Anderson MK, *Tending the Wild: Native American Knowledge and the Management of California's Natural Resources* (First edn, University of California Press 2005).

Anderson MR and Galizzi P (eds), *International Environmental Law in National Courts* (BIICL 2002).

Aust HP and Nolte G (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016).

Bantekas I, *International Human Rights Law and Practice* (Cambridge University Press 2013).

Berman PS, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (First edn, Cambridge University Press 2013).

Bhatti S and others (eds), *Contracting for ABS: The Legal and Scientific Implications of Bioprospecting Contracts* (IUCN 2009).

Birnie PW, Boyle AE and Redgwell C, *International Law and the Environment* (Third edn, Oxford University Press 2009).

Bodansky D, *The Art and Craft of International Environmental Law* (Harvard University Press 2011).

Boyle AE and Chinkin C, *The Making of International Law* (Oxford University Press 2007).

Brierly JL, *The Law of Nations: an Introduction to the International Law of Peace* (Sixth edn, Oxford University Press 1981).

Brown D, *Bury My Heart at Wounded Knee: An Indian history of the American West* (Holt Rinehart & Winston 1971).

Burger J, *Report from the Frontier: The State of the World's Indigenous Peoples* (Zed 1987).

——, *The Gaia Atlas of First peoples: A Future for the Indigenous World* (Robertson McCarta 1990).

Burgstaller M, *Theories of Compliance with International Law* (Martinus Nijhoff 2005).

Campese J and others (eds), *Rights-based Approaches: Exploring Issues and Opportunities for Conservation* (Center for International Forestry Research and IUCN 2009).

Cariño J and others, *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization: Background and Analysis* (The Berne Declaration, Bread for the World, Ecoropa, Tebtebba and Third World Network 2013).

Cassese A and Weiler J (eds), *Change and Stability in International Law-Making* (Walter de Gruyter 1988).

Charlesworth H and Chinkin C, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000).

Chayes A and Chayes AH, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1998).

Chennells R, Schroeder D and Wynberg RP (eds), *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia Case* (Springer 2009).

Clapham A, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006).

Coates K, *A Global History of Indigenous Peoples: Struggle and Survival* (Palgrave Macmillan 2004).

Cottier T, *Copyright and The Human Right to Property: A European and International Case Law Approach* (2018).

Cotula L and Mathieu P (eds), *Legal Empowerment in Practice: Using Legal Tools to Secure Land Rights in Africa* (IIED and FAO 2008).

Crawford J, *The Creation of States in International Law* (Second edn, Oxford University Press 2007).

——, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Brill 2014).

Crawford J and Brownlie I, *Brownlie's Principles of Public International Law* (Eighth edn, Oxford University Press 2012).

Cuskelly K, *Customs and Constitutions: State Recognition of Customary Law around the World* (IUCN 2011).

D'Amato AA, *International Law: Process and Prospect* (Second edn, Transnational Publishers 1995).

Dam-de Jong D, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge University Press 2015).

Dankelman I (ed), *Gender and Climate Change: An Introduction* (Earthscan 2010).

Desmet E, *Indigenous Rights Entwined with Nature Conservation* (Intersentia 2011).

Dörr O and Schmalenbach K (eds), *Vienna Convention on the Law of Treaties: a Commentary* (Springer 2012).

Doyle CM, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (Routledge 2014).

Drahos P, *Intellectual Property, Indigenous People and their Knowledge* (Cambridge University Press 2014).

Dutfield G, *Intellectual Property, Biogenetic Resources and Traditional Knowledge* (Earthscan 2004).

Engle K, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press 2010).

European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law relating to Access to Justice* (Publications Office of the European Union 2016).

Faden RR and Beauchamp TL, *A History and Theory of Informed Consent* (Oxford University Press 1986).

Farrior S (ed), *Equality and Non-Discrimination under International Law* (Routledge 2017).

Fedder B, *Marine Genetic Resources, Access and Benefit Sharing: Legal and Biological Perspectives* (Routledge 2013).

Flynn E, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Ashgate Publishing 2015).

Fung A, Graham M and Weil D, *Full Disclosure: The Perils and Promise of Transparency* (Cambridge University Press 2007).

Gardiner RK, *Treaty Interpretation* (Second edn, Oxford University Press 2015).

Gibson J, *Community Resources: Intellectual Property, International Trade, and Protection of Traditional Knowledge* (Routledge 2016).

Gilbert J, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (Second edn, Brill Nijhoff 2016).

——, *Natural Resources and Human Rights: An Appraisal* (First edn, Oxford University Press 2018).

Glowka L, *A Guide to Designing Legal Frameworks to Determine Access to Genetic Resources* (IUCN 1998).

Glowka L, Burhenne-Guilmin F and Synge H, *A Guide to the Convention on Biological Diversity* (IUCN 1994).

Greiber T and others, *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing* (IUCN 2012).

Gupta AK, *WIPO-UNEP Study on the Role of Intellectual Property Rights in the Sharing of Benefits Arising from the Use of Biological Resources and Associated Traditional Knowledge* (WIPO UNEP 2004).

Havemann P (ed), *Indigenous Peoples' Rights in Australia, Canada & New Zealand* (Oxford University Press 1999).

Heyns CH and Viljoen F (eds), *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (Martinus Nijhoff Publishers 2002).

Higgins R, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994).

Ikechi M, *Global Biopiracy: Patents, Plants, and Indigenous Knowledge* (UBC Press 2005).

Jayawickrama N, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Second edn, Cambridge University Press 2017).

Joseph S, *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* (Boris Wijkstrom 2006).

Joseph S and Castan M, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Third edn, Oxford University Press 2013).

Kamau EC and Winter G (eds), *Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit Sharing* vol 19 (Routledge 2009).

—— (eds), *Common Pools of Genetic Resources: Equity and Innovation in International Biodiversity Law* (Routledge 2013).

Kate KT and Laird SA, *The Commercial Use of Biodiversity: Access to Genetic Resources and Benefit-sharing* (Earthscan 2002).

Keane D and Waughray A, *Fifty Years of the International Convention on the Elimination of All Forms of Racial Discrimination: A Living Instrument* (Manchester University Press 2017).

Kymlicka W, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon 1995).

——, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press 2007).

Laladhas KP, Nilayangode P and Oommen OV (eds), *Biodiversity for Sustainable Development* (Springer 2017).

Lawson C, *Regulating Genetic Resources: Access and Benefit Sharing in International Law* (Edward Elgar 2012).

Lenzerini F, *The Culturalization of Human Rights Law* (Oxford University Press 2014).

Lerner N, *Group Rights and Discrimination in International Law* (Second edn, Nijhoff 2003).

Louka E, *International Environmental Law: Fairness, Effectiveness and World Order* (Cambridge University Press 2006).

Luoma-aho T and others (eds), *Forest Genetic Resources Conservation and Management* (International Plant Genetic Resources Institute 2004).

Mart′inez-Alier J, *The Environmentalism of the Poor: a Study of Ecological Conflicts and Valuation* (Edward Elgar 2002).

McAllister LK, *Making Law Matter: Environmental Protection and Legal Institutions in Brazil* (Stanford University Press 2008).

McBride J, *Access to Justice for Migrants and Asylum-seekers in Europe* (Council of Europe 2009).

McNair ADM, *The Law of Treaties* (Clarendon Press 1961).

McQuigg RJA, *International Human Rights Law and Domestic Violence: The Effectiveness of International Human Rights Law* (Routledge 2011).

Medaglia JC, Perron-Welch F and Phillips F-K, *Overview of National and Regional Measures on Access to Genetic Resources and Benefit-Sharing: Challenges and Opportunities in Implementing the Nagoya Protocol* (Third edn, CISDL 2014).

Merkouris P, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill Nijhoff 2015).

Morgan R, *Transforming Law and Institution: Indigenous Peoples, the United Nations and Human Rights* (Ashgate 2011).

Morgera E, Buck M and Tsioumani E (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013).

Morgera E, Tsioumani E and Buck M, *Unraveling the Nagoya Protocol: a Commentary on the Nagoya Protocol on Access and Benefit-sharing to the Convention on Biological Diversity* (Brill 2014).

Nowak M, *Introduction to the International Human Rights Regime* (Nijhoff 2003).

Nussbaum A, *A Concise History of the Law of Nations* (Revised edn, Macmillan 1954).

Oberthür S and Rosendal GK (eds), *Global Governance of Genetic Resources: Access and Benefit Sharing after the Nagoya Protocol* (Routledge 2014).

Oguamanam C, *International law and Indigenous knowledge: intellectual property, plant biodiversity, and traditional medicine* (University of Toronto Press 2006).

Okin SM, *Is Multiculturalism Bad for Women?* (Princeton University Press 1999).

Oppenheim L, *International Law: a Treatise* (Fourth edn, Longmans, Green and Co. 1926).

Ørebech P and others (eds), *The Role of Customary Law in Sustainable Development* (2006).

Osiatyński W, *Human Rights and Their Limits* (Cambridge University Press 2009).

Parekh BC, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Second edn, Palgrave Macmillan 2006).

Pauwelyn J, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge University Press 2003).

Ragazzi M, *The Concept of International Obligations Erga Omnes* (Oxford University Press 2000).

Ray AJ, *Aboriginal Rights Claims and the Making and Remaking of History* (McGill-Queen's University Press 2016).

Rehman J, *International Human Rights Law: A Practical Approach* (Longman 2003).

——, *International Human Rights Law* (Second edn, Longman 2010).

Riley S, *Human Dignity and Law: Legal and Philosophical Investigations* (Routledge 2018).

Robinson DF, *Confronting Biopiracy: Challenges, Cases and International Debates* (Earthscan 2010).

Robinson DF, Abdel-Latif A and Roffe P (eds), *Protecting Traditional Knowledge: the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge 2017).

Rodríguez-Piñero L, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919-1989)* (Oxford University Press 2005).

Rothbard MN, *The Ethics of Liberty* (Second edn, New York University Press 1998).

Roy RD, *Traditional Customary Laws and Indigenous Peoples in Asia* (Minority Rights Group International 2005).

Samson C, *Indigenous Peoples and Colonialism: Global Perspectives* (Polity Press 2017).

Saul B, *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* (Hart Publishing 2016).

Schrijver N, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997).

Schutter O, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2014).

Shachar A, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press 2001).

Shiva V, *Biopiracy: The Plunder of Nature and Knowledge* (South End Press 1999).

Sieder R (ed), *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (Palgrave Macmillan 2002).

Skogly S, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia 2006).

Smith RKM, *International Human Rights Law* (Eighth edn, Oxford University Press 2018).

Thornberry P, *Indigenous Peoples and Human Rights* (Manchester University Press 2002).

Tobin B, *Indigenous Peoples, Customary Law and Human Rights - Why Living Law Matters* (Routledge 2014).

Tomei M, *Indigenous and Tribal Peoples: An Ethnic Audit of Selected Poverty Reduction Strategy Papers* (International Labour Organization 2005).

Tomuschat C, *Human Rights: Between Idealism and Realism* (Oxford University Press 2014).

Tvedt MW and Young TR, *Beyond Access: Exploring Implementation of the Fair and Equitable Sharing Commitment in the CBD* (IUCN 2007).

Tyagi Y, *The UN Human Rights Committee: Practice and Procedure* (Cambridge University Press 2011).

UNCTAD, *The Convention on Biological Diversity and the Nagoya Protocol: Intellectual Property Implications A Handbook on the Interface between Global Access and Benefit Sharing Rules and Intellectual Property* (UNCTAD 2014).

Vandenhole W, *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia 2005).

Victor DG, Raustiala K and Skolnikoff EB (eds), *The Implementation and Effectiveness of International Environmental Commitments : Theory and Practice* (MIT Press 1998).

Westlake J, *Chapters on the Principles of International law* (Cambridge University Press 1894).

Xanthaki A, *Indigenous Rights and United Nations Standards: Self-determination, Culture and Land* (Cambridge University Press 2007).

Young MA (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012).

Young TR and Tvedt MW, *Drafting Successful Access and Benefit-sharing Contracts* (Brill 2017).

Zerk JA, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press 2006).

2. Contributions to Edited Books

Allen S and Xanthaki A, 'Introduction' in Allen S and Xanthaki A (eds), *Reflections on the United Nations Declaration on the Rights of Indigenous Peoples* (Hart Publication 2011).

Alvarez JE, 'Property Rights as Human Rights' in Queralt J and van der Vossen B(eds), *Economic Liberties and Human Rights* (Taylor & Francis 2019).

Anaya SJ, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in Charters C and Stavenhagen R (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA 2009).

Boyle AE, 'Human Rights and the Environment: Where Next?' in Boer B (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press 2015).

——, 'Soft Law in International Law-making' in Evans MD (ed), *International Law* (Oxford University Press 2014).

Brunnée J, 'Multilateral Environmental Agreements and the Compliance Continuum' in Winter G (ed), *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law* (Cambridge University Press 2006).

Brunnée J, 'Common Areas, Common Heritage, and Common Concern' in Bodansky D, Brunnée J and Hey E (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2012).

Castle D and Gold ER, 'Traditional Knowledge and Benefit Sharing: From Compensation to Transaction' in Peter PWB and Onwuekwe CB (eds), *Accessing and Sharing the Benefits of the Genomics Revolution* (2007).

Chayes A, Chayes AH and Mitchell RB, 'Managing Compliance: a Comparative Perspective' in Weiss EB and Jacobson HK (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press 2000).

Chennells R and Wynberg RP, 'Green Diamonds of the South: An Overview of the San-Hoodia Case' in Chennells R, Schroeder D and Wynberg RP (eds), *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia case* (Springer 2009).

Chiarolla C, Louafi S and Schloen M, 'An Analysis of the Relationship between the Nagoya Protocol and Instruments related to Genetic Resources for Food and Agriculture and Farmers' Rights' in Morgera E, Buck M and Tsioumani E (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2012).

Cippitani R, 'The 'Contractual Enforcement' of Human Rights in Europe' in Diver A and Miller J (eds), *Justiciability of Human Rights Law in Domestic Jurisdictions* (Springer 2015).

Crawford J, 'The UN Human Rights Treaty System: A System in Crisis?' in Alston P and Crawford J (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000).

Dalibard J-D and Kono T, 'Prior Informed Consent: Empowering the Bearers of Cultural Traditions' in Kono T (ed), *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development* (Intersentia 2009).

Diver A and Miller J, 'Can Rights Be Ring-Fenced in Times of Austerity? Equality, Equity and Judicial 'Trusteeship' over the UK's Fairness Agenda' in Diver A and Miller J (eds), *Justiciability of Human Rights Law in Domestic Jurisdictions* (2015).

Doyle CM, 'The Evolving Duty to Consult and Obtain Free Prior and Informed Consent of Indigenous Peoples for Extractive Projects in the United States and Canada' in Feichtner I, Krajewski M and Roesch R (eds), *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (Springer International Publishing 2019).

Drahos P, 'A Networked Responsive Regulatory Approach to Protecting Traditional Knowledge' in Gervais D (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era* (Oxford University Press 2007).

Dutfield G, 'Prior Informed Consent and Traditional Knowledge in a Multicutural World' in Kono T (ed), *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable* (Intersentia 2009).

Feyter KD, ‘Towards A Multi-Stakeholder Agreement on the Right to Development’ in Marks SP (ed), *Implementing the Right to Development: the Role of International Law* (Friedrich-Ebert-Stiftung 2008).

Francioni F, ‘International Law for Biotechnology: Basic Principles’ in Francioni F and Scovazzi T (eds), *Biotechnology and International Law* (Hart 2006).

——, ‘The Rights of Access to Justice under Customary International Law’ in Francioni F (ed), *Access to Justice as a Human Right* (Oxford University Press 2007).

——, ‘Natural Resources and Human Rights’ in Elisa M and Kati K (eds), *Research Handbook on International Law and Natural Resources* (2016).

Gilbert J, ‘CERD's Contribution to the Development of the Rights of Indigenous Peoples under International Law’ in Keane D and Waughray A (eds), *Fifty Years of the International Convention on the Elimination of All Forms of Racial Discrimination: A Living Instrument* (Manchester University Press 2017).

Glowka L and Normand V, ‘The Nagoya Protocol on Access and Benefit-Sharing: Innovations in International Environmental Law’ in Morgera E, Buck M and Tsioumani E (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013).

Godt C, ‘The Multi-Level Implementation of the Nagoya Protocol in the European Union’ in Coolsaet B and others (eds), *Implementing the Nagoya Protocol Comparing Access and Benefit-sharing Regimes in Europe* (Nijhoff 2015).

Gollin MA, ‘An Intellectual Property Rights Framework for Biodiversity Prospecting’ in Reid WV and others (eds), *Biodiversity Prospecting: Using Genetic Resources for Sustainable Development* (World Resources Institute 1993).

Hall GH and Patrinos HA, ‘Introduction’ in Hall GH and Patrinos HA (eds), *Indigenous Peoples, Poverty and Development* (Cambridge University Press 2012).

Jinks D and Goodman R, ‘Social Mechanisms to Promote International Human Rights: Complementary or Contradictory? ’ in Risse-Kappen T and others (eds), *The Persistent Power of Human Rights: from Commitment to Compliance* (Cambridge University Press 2013).

Johnson M, ‘Research on Traditional Environmental Knowledge: Its Development and its Role’ in Johnson M (ed), *Lore: Capturing Traditional Environmental Knowledge* (IDRC/CRDI 2014).

Kadelbach S, ‘Jus Cogens, Obligations Erga Omnes and Other Rules - the Identification of Fundamental Norms’ in Tomuschat C and Thouvenin J-M (eds),

The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes (Brill 2005).

Klabbers J, 'Compliance Procedures' in Bodansky D, Brunnée J and Hey E (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2008).

Lalonde A, 'African Indigenous Knowledge and its Relevance to Sustainable Development' in Inglis JT (ed), *Traditional Ecological Knowledge: Concepts and Cases* (International Program on Traditional Ecological Knowledge and IDRC 1993).

Lillich RB, 'Civil Rights' in Meron T (ed), *Human Rights in International Law: Legal and Policy Issues* (Clarendon 1984).

MacKay F, 'Indigenous Peoples' Rights and the Committee on the Elimination of Racial Discrimination' in Dersso SA (ed), *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (Pretoria University Law Press 2010).

Magallanes CJI, 'International Human Rights and Their Impact on Domestic Law on Indigenous Peoples' Rights in Australia, Canada, and New Zealand' in Havemann P (ed), *Indigenous Peoples' Rights in Australia, Canada & New Zealand* (Oxford University Press 1999).

Marks SP, 'The Human Rights Framework for Development: Seven Approaches' in Sengupta A, Negi A and Basu M (eds), *Reflections on the Right to Development* (SAGE 2005).

Mata G and Sasvári AA, 'Integrating Gender Equality and Equity in Access and Benefit-sharing Governance: Through a Rights-based Approach' in Campese J (ed), *Rights-based Approaches: Exploring Issues and Opportunities for Conservation* (CIFOR 2009).

Matz-Lück N, 'Norm Interpretation across International Regimes: Competences and Legitimacy' in Young MA (ed), *Regime Interaction in International Law Facing Fragmentation* (Cambridge University Press 2012).

McBarnet DJ, 'Corporate Social Responsibility beyond Law, through Law, for Law: the New Corporate Accountability' in McBarnet DJ, Voiculescu A and Campbell T (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007).

Mégret F, 'Nature of Obligations' in Moeckli D and others (eds), *International Human Rights Law* (Third edn, Oxford University Press 2018).

Morgera E, 'Benefit-Sharing as a Bridge between the Environmental and Human Rights Accountability of Multinational Corporations' in Boer B (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press 2015).

Munyi P and Jonas H, ‘Implementing the Nagoya Protocol in Africa: Opportunities and Challenges for African Indigenous Peoples and Local Communities’ in Morgera E, Buck M and Tsioumani E (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013).

Nègre C, ‘Responsibility and International Environmental Law’ in Crawford J, Pellet A and Olleson S (eds), *The Law of International Responsibility* (Oxford University Press 2010).

Nijar GS, ‘An Asian Developing Country's View on the Implementation Challenges of the Nagoya Protocol’ in Morgera E, Buck M and Tsioumani E (eds), *The 2010 Nagoya Protocol on Access and Benefit-Sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013).

Nollkaemper A, ‘Responsibility of Transnational Corporations in International Environmental Law: Three Perspectives’ in Winter G (ed), *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law* (Cambridge University Press 2006).

Quane H, ‘The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights?’ in Allen S and Xanthaki A (eds), *Reflections on the United Nations Declaration on the Rights of Indigenous Peoples* (Hart Pub. 2011).

Randolph S and Hertel S, ‘The Right to Food: A Global Perspective’ in Minkler L (ed), *The State of Economic and Social Human Rights: A Global Overview* (Cambridge University Press 2010).

Risse-Kappen T and Ropp SC, ‘Introduction and Overview’ in Risse-Kappen T and others (eds), *The Persistent Power of Human Rights: from Commitment to Compliance* (Cambridge University Press 2013).

Rodríguez-Pinero L, ‘The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement’ in Allen S and Xanthaki A (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Bloomsbury Publishing 2011).

Savaresi A, ‘The International Human Rights Law Implications of the Nagoya Protocol’ in Morgera E, Buck M and Tsioumani E (eds), *The 2010 Nagoya Protocol on Access and Benefit-Sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013).

Schermers HG, ‘The International Protection of the Right of Property’ in Matscher F, Petzold H and Wiarda GrJ (eds), *Protecting Human Rights: the European Dimension* (C. Heymanns Verlag 1988).

Schulte-Tenckhoff I, ‘Treaties, Peoplehood, and Self-determination: Understanding the Language of Indigenous Rights’ in Pulitano E (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press 2012).

Schultes RE, ‘Reasons for Ethnobotanical Conservation’ in Johannes RE (ed), *Traditional Ecological Knowledge: a Collection of Essays* (IUCN 1989).

Sengupta AK, ‘Conceptualizing the Right to Development for the Twenty-first Century’ in, *Realizing the Right to Development* (UN Publication 2013).

Shelton D, ‘International Law and 'Relative Normativity'’ in Evans MD (ed), *International Law* (Fourth edn, Oxford University Press 2014).

Stewart RB, ‘Economic Incentives for Environmental Protection: Opportunities and Obstacles’ in Revesz RL, Sands P and Stewart RB (eds), *Environmental Law, the Economy and Sustainable Development* (Cambridge University Press 2000).

Stoll P-T, ‘Intellectual Property and Technologies Article 31’ in Hohmann J and Weller M (eds), *The UN Declaration on the Rights of Indigenous Peoples: a Commentary* (First edn, Oxford University Press 2018).

Tobin B, ‘The Role of Customary Law and Practice in the Protection of Traditional Knowledge related to Biological Diversity’ in Antons C (ed), *Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property Law in the Asia-Pacific Region* (Aspen Publishers 2009).

——, ‘Setting Protection of TK to Rights: Placing Human Rights and Customary Law at the Heart of TK Governance’ in Kamar EC and Winter G (eds), *Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit Sharing* (Routledge 2009).

——, ‘Biodiverstiy Prospecting Contracts: The Search for Equitable Agreements’ in laird SA (ed), *Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice* (Earthscan 2010).

Tomasevski K, ‘Women's Rights’ in Symonides J (ed), *Human Rights: Concept and Standard* (Ashgate 2000).

Trindade AAC, ‘Some Reflections on the Right of Access to Justice in Its Wide Dimension’ in Wolfrum R, Seršić M and Šošić T (eds), *Contemporary Developments in International Law* (Brill Nijhoff 2015).

Tvedt MW, ‘Beyond Nagoya: Towards a Legally Functional System of Access and Benefit sharing’ in Oberthür S and Rosendal GK (eds), *Global Governance of Genetic Resources Access and Benefit Sharing after the Nagoya Protocol* (Routledge 2013).

Vaurs-Chamette A-L, ‘Peoples and Minority Groups’ in Crawford J, Pellet A and Olleson S (eds), *The Law of International Responsibility* (Oxford University Press 2010).

Wallbott L, Wolff F and Pozarowska J, ‘The Negotiations of the Nagoya Protocol: Issues, Coalitions and Process’ in Oberthür S and Rosendal GK (eds), *Global Governance of Genetic Resources: Access and Benefit sharing after the Nagoya Protocol* (Routledge 2014).

Weiss EB and Jacobson HK, ‘Assessing the Record and Designing Strategies to Engage Countries’ in Weiss EB and Jacobson HK (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press 2000).

Williams T and Hardison P, ‘Culture, Law, Risk and Governance: Contexts of Traditional Knowledge in Climate Change Adaptation’ in Maldonado JK, Colombi B and Pandya R (eds), *Climate Change and Indigenous Peoples in the United States: Impacts, Experiences and Actions* (Springer International Publishing 2014).

Wright Q, ‘Relationship Between Different Categories of Human Rights’ in UNESCO (ed), *Human Rights: Comments and Interpretations* (A. Wingate 1949).

Young TR, ‘An International Cooperation Perspective on the Implementation of the Nagoya Protocol’ in Morgera E, Buck M and Tsioumani E (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill Nijhoff 2013).

3. Journal Articles

Abebe AM, ‘Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council’ (2009) 9 (1) Human Rights Law Review.

Abi-Saab G, ‘Fragmentation or Unification: Some Concluding Remarks’ (1999) 31 (4) New York University Journal of International Law and Politics.

Alain P and Claire M, ‘The Cut that Makes a Part’ (2012) 7 (2) BioSocieties.

Alston P, ‘A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?’ (1982) 29 (3) Netherlands International Law Review.

——, ‘Making Space for New Human Rights: The Case of the Right to Development’ (1988) 1 Harvard Human Rights Yearbook.

Altieri MA, ‘Linking Ecologists and Traditional Farmers in the Search for Sustainable Agriculture’ (2004) 2 Frontiers in Ecology and the Environment.

Alvarez-Castillo F and Feinholz D, ‘Women In Developing Countries and Benefit Sharing’ (2006) 6 (3) Developing World Bioethics.

Anaya SJ, ‘Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend’ (2005) 16 (2) Colorado Journal of International Environmental Law and Policy.

——, ‘Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources’ (2005) 22 (1) Arizona Journal of International and Comparative Law.

Arnold DG, ‘Corporations and Human Rights Obligations’ (2016) 1 (2) Business and Human Rights Journal.

Artuso A, ‘Bioprospecting, Benefit Sharing, and Biotechnological Capacity Building’ (2002) 30 (8) World Development.

Barelli M, ‘Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead’ (2012) 16 (1) The International Journal of Human Rights.

Barsh R, ‘The Right to Development as a Human Right: Results of the Global Consultation’ (1991) 13 (3) Human Rights Quarterly.

——, ‘Indigenous Peoples in the 1990s: From Object to Subject of International Law?’ (1994) 7 Harvard Human Rights Journal.

Bavikatte K and Robinson DF, ‘Towards a Peoples History of the Law: Biocultural Jurisprudence and the Nagoya protocol on Access and Benefit Sharing’ (2011) 7 (1) Law, Environment and Development Journal.

Biermann F, ‘"Common concern of humankind": The Emergence of a New Concept of International Environmental Law’ (1996) 34 (4) Archiv des Völkerrechts.

Blasiak R and others, ‘Corporate Control and Global Governance of Marine Genetic Resources’ (2018) 4 (6) Science Advances.

Bluemel EB, ‘Separating Instrumental from Intrinsic Rights: Toward an Understanding of Indigenous Participation in International Rule-Making’ (2005) 30 (1) American Indian Law Review.

Boyle AE, ‘Human Rights or Environmental Rights? A Reassessment’ (2007) 18 (3) Fordham Environmental Law Review.

Brilmayer L, ‘Secession and Self-determination: a Territorial Interpretation’ (1991) 16 (1) The Yale Journal of International Law.

Buchanan A, ‘Role of Collective Rights in the Theory of Indigenous Peoples' Rights’ (1993) 3 (1) Transnational Law & Contemporary Problems.

Buck M and Hamilton C, ‘The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity’ (2011) 20 (1) Review of European Community & International Environmental Law.

Butzier SR and Stevenson SM, ‘Indigenous Peoples’ Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent’ (2014) 32 (3) Journal of Energy & Natural Resources Law.

Cappelletti M and Garth B, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1978) 27 (2) Buffalo Law Review.

Cardesa-Salzmann A, ‘Constitutionalising Secondary Rules in Global Environmental Regimes: Non-Compliance Procedures and the Enforcement of Multilateral Environmental Agreements’ (2012) 24 (1) Journal of Environmental Law.

Cariño J, ‘Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice’ (2005) 22 (1) Arizona Journal of International and Comparative Law.

Castellino J, ‘Territorial Integrity and the Right to Self-Determination: An Examination of the Conceptual Tools’ (2008) 33 (2) Brooklyn Journal of International Law.

Cavallaro J and Brewer SE, ‘Reevaluating Regional Human Rights Litigation in the Twenty-first Century: the Case of the Inter-American Court’ (2008) 102 (4) American Journal of International Law.

Chapman AR, ‘The Human Rights Implications of Intellectual Property Protection’ (2002) 5 (4) Journal of International Economic Law.

Charlesworth H, ‘Feminist Methods in International Law’ (1999) 93 (2) American Journal of International Law.

Chayes A and Chayes AH, ‘On Compliance’ (1993) 47 (2) International Organization.

Chennells R, ‘Traditional Knowledge and Benefit Sharing after the Nagoya Protocol: Three Cases from South Africa’ (2013) 9 (2) Law, Environment and Development Journal.

Clapp J, ‘Global Environmental Governance for Corporate Responsibility and Accountability’ (2005) 5 (3) Global Environmental Politics.

Cogan JK, ‘The Regulatory Turn in International Law’ (2011) 52 (2) Harvard International Law Journal.

Coombe RJ, ‘Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity’ (1998) 6 (1) Indiana journal of global legal studies.

——, ‘The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law’ (2001) 14 (2) St Thomas Law Review.

——, ‘Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Right or Claims to an Alternative Form of Sustainable Development?’ (2005) 17 Florida Journal of International Law 115.

Cottier T and Panizzon M, ‘Legal perspectives on traditional knowledge: The case for intellectual property protection’ (2004) 7 (2) Journal of International Economic Law.

Daes E-I, ‘Intellectual Property and Indigenous Peoples’ (2001) 95 Proceedings of the Annual Meeting (American Society of International Law).

Davis M, ‘To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On’ (2012) 19 Australian International Law Journal.

De Schutter O, ‘The Emerging Human Right to Land’ (2010) 12 (3) International Community Law Review.

Dinstein Y, ‘Collective Human Rights of Peoples and Minorities’ (1976) 25 (1) International and Comparative Law Quarterly.

Donnelly J, ‘In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development’ (1985) 15 (3) California Western International Law Journal.

Downes DR, ‘How Intellectual Property Could be a Tool to Protect Traditional Knowledge’ (2000) 25 (2) Columbia Journal of Environmental Law.

Downs GW, ‘Enforcement and the Evolution of Cooperation’ (1998) 19 (2) Michigan Journal of International Law.

Dutfield G, ‘TK Unlimited: The Emerging but Incoherent International Law of Traditional Knowledge Protection’ (2017) 20 (5-6) Journal of World Intellectual Property.

Emerson R, ‘Self-Determination’ (1971) 65 American Journal of International Law.

Engle K, ‘On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights’ (2011) 22 (1) European Journal of International Law.

Esquivel V and Sweetman C, ‘Gender and the Sustainable Development Goals’ (2016) 24 (1) Gender & Development.

Fastenrath U, ‘Relative Normativity in International Law’ (1993) 4 (3) European Journal Of International Law.

Fitzmaurice M, ‘The Dilemma of Traditional Knowledge: Indigenous Peoples and Traditional Knowledge’ (2008) 10 (3) International Community Law Review.

Fitzmaurice MA, ‘International Environmental Law as a Special Field’ (1994) 25 Netherlands Yearbook of International Law.

Foster CE, ‘Articulating Self-determination in the Draft Declaration on the Rights of Indigenous Peoples’ (2001) 12 (1) European Journal of International Law.

Fritsch S, ‘The UN Global Compact and the Global Governance of Corporate Social Responsibility: Complex Multilateralism for a More Human Globalisation?’ (2008) 22 (1) Global Society.

Gerards JH and Glas LR, ‘Access to justice in the European Convention on Human Rights system’ (2017) 35 (1) Netherlands Quarterly of Human Rights.

Gerd W and Evanson Chege K, ‘Model Clauses for Mutually Agreed Terms on Access to Genetic Resources and Benefit Sharing’ (2016) 12 (1) Law, Environment and Development Journal.

Gervais DJ, ‘Traditional Knowledge & Intellectual Property: a TRIPS-Compatible Approach’ (2005).

Gilbert J, ‘Land Rights as Human Rights: the Case for a Specific Right to Land’ (2013) 10 (18) International Journal of Human Rights.

Girsberger MA, ‘Transparency Measures under Patent Law regarding Genetic Resources and Traditional Knowledge’ (2004) 7 (4) Journal of World Intellectual Property.

Goodman R and Jinks D, ‘Measuring the Effects of Human Rights Treaties’ (2003) 14 (1) European Journal of International Law.

Gorenflo L and others, ‘Co-occurrence of Linguistic and Biological Diversity in Biodiversity Hotspots and High Biodiversity Wilderness Areas’ (2012) 109 (21) Proceedings of the National Academy of Sciences of the United States of America.

Gubarev MV, ‘Misappropriation and Patenting of Traditional Ethnobotanical Knowledge and Genetic Resources’ (2012) 8 (1) Journal of Food Law & Policy.

Hafnerburton E and Tsutsui K, ‘Human Rights in a Globalizing World: The Paradox of Empty Promises’ (2005) 110 (5) American Journal of Sociology.

Halewood M and others, ‘Implementing Mutually Supportive Access and Benefit Sharing Mechanisms under the Plant Treaty, Convention on Biological Diversity, and Nagoya Protocol’ (2013) 9 (1) Law, Environment and Development Journal.

Handl G, ‘Compliance Control Mechanisms and International Environmental Obligations’ (1997) 5 Tulane Journal of International and Comparative Law.

Hathaway OA, ‘Do Human Rights Treaties Make A Difference?’ (2002) 111 (8) Yale Law Journal.

——, ‘Why Do Countries Commit to Human Rights Treaties?’ (2007) 51 (4) Journal of Conflict Resolution.

Hawkins D and Jacoby W, ‘Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights’ (2010) 6 (1) Journal of International Law and International Relations.

Heins V, ‘Human Rights, Intellectual Property, and Struggles for Recognition’ (2008) 9 Human Rights Review.

Helfer LR, ‘Human Rights and Intellectual Property: Conflict or Co-Existence?’ (2004) 22 (2) Netherlands Quarterly of Human Rights.

——, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’ (2008) 19 (1) European Journal of International Law.

Henkin L, ‘That "S" Word: Sovereignty, and Globalization, and Human Rights, et cetera’ (1999) 68 (1) Fordham Law Review.

Holder CL and Corntassel JJ, ‘Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights’ (2002) 24 (1) Human Rights Quarterly.

Hughes P, ‘Law Commissions and Access to Justice: What Justice Should We Be Talking About?’ (2008) 46/4 Osgoode Hall Law Journal.

Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore WIPO, ‘The Protection of Traditional Knowledge: Draft Articles’ (2 June 2014) WIPO Doc WIPO/GRTKF/IC/28/5.

Iorns CJ, ‘Indigenous Peoples and Self-Determination: Challenging State Sovereignty’ (1992) 24 (2) Case Western Reserve Journal of International Law.

Jackson J, ‘Sovereignty-modern: a New Approach to an Outdated Concept’ (2003) 97 (4) American Journal of International Law.

Jonge BD, ‘What is Fair and Equitable Benefit-sharing?’ (2011) 24 (2) Journal of Agricultural and Environmental Ethics.

——, ‘Towards a Fair and Equitable ABS Regime: Is Nagoya Leading Us in the Right Direction?’ (2013) 9 (2) Law, Environment and Development Journal.

Joyner CC and Little GE, ‘It's Not Nice to Fool Mother Nature: The Mystique of Feminist Approaches to International Environmental Law’ (1996) 14 (2) Boston University International Law Journal.

Kelsen H, ‘On the theory of interpretation’ (1990) 10 (2) Legal Studies.

Kingsbury B, ‘The Concept of Compliance as a Function of Competing Conceptions of International Law’ (1998) 19 (2) Michigan Journal of International Law.

——, '"Indigenous Peoples" in International Law: a Constructivist Approach to the Asian Controversy' (1998) 92 (3) American Journal of International Law.

——, 'Sovereignty and Inequality' (1998) 9 (4) European Journal of International Law.

Kirgis FL, 'The Degrees of Self-Determination in the United Nations Era' (1994) 88 (2) American Journal of International Law.

Koskenniemi M, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 (2) International and Comparative Law Quarterly.

——, 'Solidarity Measures: State Responsibility as a New International Order?' (2001) 72 British Yearbook of International Law.

Koskenniemi M and Leino P, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 (3) Leiden Journal of International Law.

Koutouki K and Bieberstein KR, 'The Nagoya Protocol: Sustainable Access and Benefits-sharing for Indigenous and Local Communities' (2012) 13 (3) Vermont Journal of Environmental Law.

Kramer L, 'Public Interest Litigation in Environmental Matters before European Courts' (1996) 8 (1) Journal of Environmental Law.

Leckie S, 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?' (1988) 10 (2) Human Rights Quarterly.

Macdonald R and Kleinhans M-M, 'What is a Critical Legal Pluralism?' (1997) 12 (2) Canadian Journal of Law and Society.

MacKay F, 'Universal Rights or a Universe unto Itself--Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples' (2002) 17 (3) American University International Law Review.

Maffi L, 'Linguistic, Cultural and Biological Diversity' (2005) 34 Annual Review of Anthropology.

Magnarella PJ, 'The Evolving Right of Self-Determination of Indigenous Peoples' (2001) 14 (2) St Thomas Law Review.

Magraw DB and Baker L, 'Globalization, Communities and Human Rights: Community-Based Property Rights and Prior Informed Consent' (2007) 35 Denver Journal of International Law and Policy.

Maiga A and others, 'A Survey of Toxic Plants on the Market in the District of Bamako, Mali: Traditional Knowledge Compared with a Literature Search of Modern Pharmacology and Toxicology' (2005) 96 (1) Journal of Ethnopharmacology.

Malloy R, 'Equating Human Rights and Property Rights - The Need for Moral Judgment in an Economic Analysis of Law and Social Policy' (1986) 47 (1) Ohio State Law Journal.

Marks S, ‘The Human Right to Development: Between Rhetoric and Reality’ (2004) 17 Harvard Human Rights Journal.

Marks SP, ‘Emerging Human Rights: A New Generation for the 1980s?’ (1981) 33 (2) Rutgers Law Review.

Matz-Lück N, ‘Harmonization, Systemic Integration and ’Mutual Supportiveness’ as Conflict-Solution Techniques’ (2008) 17-2006 Finnish Yearbook of International Law.

McCorquodale R, ‘Self-determination: a Human Rights Approach’ (1994) 43 International and Comparative Law Quarterly.

McCorquodale R and Simons P, ‘Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law’ (2007) 70 (4) Modern Law Review.

McDonald J, ‘Politics, Process and Principle: Mutual Supportiveness or Irreconcilable Differences in the Trade-Environment Linkage’ (2007) 30 (2) University of New South Wales Law Journal.

McGrady B, ‘Fragmentation of International Law or "Systematic Integration" of Treaty Regimes: EC-Biotech Products and the proper interpretation of article 31(3)(c) of the Vienna Convention on the Law of Treaties’ (2008) 42 (4) Journal of World Trade.

McLachlan C, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 (2) International and Comparative Law Quarterly.

McMahon J and Young MA, ‘The WTO's Use of Relevant Rules of International Law: an Analysis of the Biotech Case’ (2007) 56 (4) International and Comparative Law Quarterly.

Morgera E, ‘Far Away, So Close: A Legal Analysis of the Increasing Interactions between the Convention on Biological Diversity and Climate Change Law’ (2011) 2 (1) Climate Law.

——, ‘Fair and Equitable Benefit-Sharing at the Cross-Roads of the Human Right to Science and International Biodiversity Law’ (2015) 4 (4) Laws.

——, ‘The Need for an International Legal Concept of Fair and Equitable Benefit Sharing’ (2016) 27 (2) European Journal of International Law.

Morgera E and Tsioumani E, ‘The Evolution of Benefit Sharing: Linking Biodiversity and Community Livelihoods’ (2010) 19 (2) Review of European Community & International Environmental Law.

Moroni S, ‘Property as a Human Right and Property as a Special Title’ (2018) 70 Land Use Policy.

Muchlinski PT, ‘Human Rights and Multinationals: Is there a Problem?’ (2001) 77 (1) International Affairs.

Mulligan SP, ‘For Whose Benefit? Limits to Sharing in the Bioprospecting ‘Regime’’ (1999) 8 (4) Environmental Politics.

Ndulo M, ‘African Customary Law, Customs, and Women's Rights’ (2011) 18 (1) Indiana journal of global legal studies.

Ni K-J, ‘Legal Aspects of Prior Informed Consent on Access to Genetic Resources: An Analysis of Global Lawmaking and Local Implementation Toward an Optimal Normative Construction’ (2009) 42 (1) Vanderbilt Journal of Transnational Law.

——, ‘Traditional Knowledge and Global Lawmaking’ (2011) 10 (2) Northwestern Journal of International Human Rights.

Nijar GS, ‘Incorporating Traditional Knowledge in an International Regime on Access to Genetic Resources and Benefit Sharing: Problems and Prospects’ (2010) 21 (2) European Journal of International Law.

——, ‘The Nagoya Protocol on Access and Benefit Sharing of Genetic Resources: Analysis and Implementation Options for Developing Countries’ (2011).

O'Flaherty M, ‘The Concluding Observations of United Nations Human Rights Treaty Bodies’ (2006) 6 (1) Human Rights Law Review.

Okafor OC, ‘Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective’ (2005) 43 (1 2) Osgoode Hall Law Journal.

Okin SM, ‘Feminism and Multiculturalism: Some Tensions’ (1998) 108 (4) Ethics.

Omar SM, ‘The Right to Self-determination and the Indigenous People of Western Sahara’ (2008) 21 (1) Cambridge Review of International Affairs.

Ostergard RLJ, ‘Intellectual Property: A Universal Human Right?’ (1999) 21 (1) Human Rights Quarterly.

Paust JJ, ‘Human Rights Responsibilities of Private Corporations’ (2002) 35 (3) Vanderbilt Journal of Transnational Law.

Pauwelyn J, ‘A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?’ (2003) 14 (5) European Journal of International Law.

Pavoni R, ‘Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the ‘WTO-and-Competing-Regimes’ Debate?’ (2010) 21 (3) European Journal of International Law.

Pereira R and Gough O, ‘Permanent Sovereignty over Natural Resources in the 21st century: Natural Resource Governance and the Right to Self-determination of Indigenous Peoples under International Law’ (2014) 14 (2) Melbourne Journal of International Law.

Perrez FX, ‘The Mutual Supportiveness of Trade and Environment’ (2006) 100 Proceedings of the Annual Meeting (American Society of International Law).

Rabitz F, ‘Biopiracy after the Nagoya Protocol: Problem Structure, Regime Design and Implementation Challenges’ (2015) 9 (2) Brazilian Political Science Review.

Raffa KF and others, ‘Cross-scale Drivers of Natural Disturbances Prone to Anthropogenic Amplification: The Dynamics of Bark Beetle Eruptions’ (2008) 58 (6) BioScience.

Raftopoulos M and Short D, ‘Implementing Free Prior and Informed Consent: the United Nations Declaration on the Rights of Indigenous Peoples (2007), the Challenges of REDD+ and the Case for the Precautionary Principle’ (2019) 23 (1-2) The International Journal of Human Rights.

Razavi S, ‘The 2030 Agenda: Challenges of Implementation to Attain Gender Equality and Women's Rights’ (2016) 24 (1) Gender & Development.

Reisman WM, ‘The View from the New Haven School of International Law’ (1992) 86 Proceedings of the Annual Meeting (American Society of International Law).

Reisman WM, ‘Protecting Indigenous Rights in International Adjudication’ (1995) 89 (2) American Journal of International Law.

Rens J, ‘The Development of the Andean Indian Programme and Its Future’ (1964) 18 (104) Ekistics.

Rich R, ‘The Right to Development as an Emerging Human Right’ (1983) 23 (2) Virginia Journal of International Law.

Roa M and Klugman B, ‘Considering Strategic Litigation as an Advocacy Tool: a Case Study of the Defence of Reproductive Rights in Colombia’ (2014) 22 (44) Reproductive Health Matters.

Rudolff B and Raymond S, ‘A Community Convention? An Analysis of Free, Prior and Informed Consent Given under the 2003 Convention’ (2013) 8 International Journal Of Intangible Heritage.

Ruggie JG, ‘Business and Human Rights: The Evolving International Agenda’ (2007) 101 (4) American journal of international law.

Salomon ME, ‘Legal Cosmopolitanism and the Normative Contribution of the Right to Development’ (2008) LSE Law, Society and Economy Working Papers 16/2008.

Schall C, ‘Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?’ (2008) 20 (3) Journal of Environmental Law.

Schmidt MG, ‘Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform’ (1992) 41 (3) International and Comparative Law Quarterly.

Sengupta AK, ‘On the Theory and Practice of the Right to Development’ (2002) 24 (4) Human Rights Quarterly.

——, ‘The Human Right to Development’ (2004) 32 (2) Oxford Development Studies.

Shelton D, ‘A response to Donnelly and Alston’ (1985) 15 (3) California Western International Law Journal.

Short L, ‘Tradition versus Power: When Indigenous Customs and State Laws Conflict’ (2014) 15 (1) Chicago Journal of International Law.

Simpson G, ‘The Diffusion of Sovereignty: Self-determination in the Post-colonial Age’ (1996) 32 (2) Stanford Journal Of International Law.

Slaughter A-M, ‘Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform’ (2005) 99 (3) American Journal of International Law.

Spears SA and Laplante LJ, ‘Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector’ (2008) 11 Yale Human Rights and Development Law Journal.

Suiseeya KRM, ‘Negotiating the Nagoya Protocol: Indigenous Demands for Justice’ (2014) 14 (3) Global Environmental Politics.

Swepston L, ‘A new step in the international law on Indigenous and tribal peoples: ILO convention No. 169 of 1989’ (1990) 15 (3) Oklahoma City University Law Review.

Tobin B, ‘Biopiracy by Law: European Union Draft Law Threatens Indigenous People's Rights over Their Traditional Knowledge and Genetic Resources’ (2014) 36 (2) EIPR: European Intellectual Property Review.

Tsioumani E, ‘Access and Benefit Sharing: The Nagoya Protocol’ (2010) 40 (6) Environmental Policy and Law.

Tully S, ‘The Bonn Guidelines on Access to Genetic Resources and Benefit Sharing’ (2003) 12 (1) Review of European Comparative and International Environmental Law.

Turpel ME, ‘Indigenous People's Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition’ (1992) 25 (3) Cornell International Law Journal.

Uhlmann EMK, ‘State Community Interests, Jus Cogens and Protection of the Global Environment: Developing Criteria for Peremptory Norms’ (1998) 11 (1) Georgetown International Environmental Law Review.

van Der Molen P, ‘Property, Human Rights Law and Land Surveyors’ (2016) 48 (346) Survey Review.

Vandenbogaerde A, ‘The Right to Development in International Human Rights Law: A Call for its Dissolution’ (2013) 31 (2) Netherlands Quarterly of Human Rights.

Vandenhole W, ‘Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development?’ (2009) 17 (1) The International Journal of Children's Rights.

Vermeylen S, ‘Contextualizing ‘Fair’ and ‘Equitable’: The San's Reflections on the Hoodia Benefit-Sharing Agreement’ (2007) 12 (4) Local Environment.

——, ‘The Nagoya Protocol and Customary Law: the Paradox of Narratives in the Law’ (2013) 9 (2) Law, Environment and Development Journal.

Villaroman NG, ‘The Right to Development: Exploring the Legal Basis of a Supernorm’ (2010) 22 (2) Florida Journal of International Law.

Weill P, ‘Towards Relative Normativity in International Law?’ (1983) 77 (3) American Journal of International Law.

Wiessner S, ‘Rights and Status of Indigenous peoples: a Global Comparative and International Legal Analysis’ (1999) 12 Harvard Human Rights Journal.

——, ‘The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges’ (2011) 22 (1) European Journal of International Law.

Xanthaki A, ‘Indigenous Rights in International Law over the Last 10 Years and Future Developments’ (2009) 10 (1) Melbourne Journal of International Law.

Young MA, ‘The WTO's Use of Relevant Rules of International Law: an Analysis of the Biotech Case’ (2007) 56 (4) International and Comparative Law Quarterly.

Yu PK, ‘Reconceptualizing Intellectual Property Interests in a Human Rights Framework’ (2007) 40 (3) UC Davis Law Review.

Zheng X, ‘Key Legal Challenges and Opportunities in the Implementation of the Nagoya Protocol: The Case of China’ (2019) 28 (2) Review of European, Comparative and International Environmental Law.

4. Reports

Anaya SJ and Wiessner S, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment* (JURIST Forum, 2007) http://www.jurist.org/forum/2007/10/un-declaration-on-rights-of-Indigenous.php> accessed 27/11/2017.

Andersen R and Winge T, *The Access and Benefit-Sharing Agreement on Teff Genetic Resources: Facts and Lessons* (Fridtjof Nansen Institute, 2012) http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Pulications/FNI/FNI-R0612.pdf> accessed 09/07/2018.

Barber CV, Johnston S and Tobin B, *User Measures: Options for Developing Measures in User Countries to Implement the Access and Benefit–Sharing Provisions of the Convention on Biological Diversity* (UNU-IAS, 2003) http://collections.unu.edu/eserv/UNU:3106/UNUIAS_UserMeasures_2ndEd.pdf> accessed 23/08/2018.

Bernasconi-Osterwalder N, *Interpreting WTO Law and the Relevance of Multilateral Environmental Agreements in EC-Biotech* (Center for International Environmental Law (CIEL), 22-23 May 2007) https://www.ciel.org/reports/interpreting-wto-law-and-the-relevance-of-multilateral-environmental-agreements-in-ec-biotech-background-note-to-presentation-by-nathalie-bernasconi-osterwalder-may-2007-2/> accessed 22/09/2018.

Chiarolla C, *Biopiracy and the Role of Private International Law under the Nagoya Protocol* (IDDRI, 2012)

Elisa M, *Under the Radar: Fair and Equitable Benefit-sharing and the Human Rights of Indigenous Peoples and Local Communities related to Natural Resources* (BENELEX Working Paper N. 10, 2018) https://ssrn.com/abstract=2887803> accessed 03/05/2018.

Council of Europe, *Annual Report 2017 of the European Court of Human Rights* (ECHR, 2018)

——, *Annual Report 2018 of the European Court of Human Rights* (ECHR, 2019)

Human Rights Council, *Zero Draft 16.7.2018*) https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> accessed 16/07/2019.

IPM, *Prior Informed Consent A Briefing for the IPM in Developing Countries Project* (IPM, 1998) http://www.pan-uk.org/archive/Internat/IPMinDC/pmn5.pdf> accessed 01/09/2016.

Koester V, *The Nagoya Protocol on ABS: Ratification by the EU and its Member States and Implementation Challenges* (Institute for Sustainable Development and International Relations, 2012)

McBride J, *Access to Justice for Migrants and Asylum-seekers in Europe* (CDCJ, 2009)

PFII, *Who are Indigenous Peoples?* (UN PFII, 21 October 2007) https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf> accessed 11/03/2018.

Stavenhagen R, *Indigenous Peoples in Comparative Perspective* (United Nations Development Programme, 2004) http://hdr.undp.org/sites/default/files/hdr2004_rodolfo_stavenhagen.pdf> accessed 04/05/2018.

Tribunal W, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy affecting Māori Culture and Identity. Te Taumata Tuatahi.* (Waitangi Tribunal, 2010) https://www.waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/> accessed 28/01/2019.

5. Webpages

BBC, 'Maasai Displaced after Huts Burned in Tanzania' (*BBC*, 16 August 2017) <http://www.bbc.co.uk/news/world-africa-40950383> accessed 08/11/2018.

CBD, 'List of Parties' (*CBD*, 1992) <https://www.cbd.int/information/parties.shtml> accessed 03/03/2019.

——, 'Access and Benefit-Sharing Clearing-House' (*CBD*, 2014) < https://absch.cbd.int/> accessed 03/06/2019.

——, 'Bio-Bridge Initiative' (*CBD*, 2014) <https://www.cbd.int/biobridge/> accessed 02/01/2019.

——, 'Country Profiles: Brazil' (*CBD*, 2014) <https://absch.cbd.int/countries/BR> accessed 03/03/2019.

——, 'Country Profiles: India' (*CBD*, 2018) <https://absch.cbd.int/countries/IN> accessed 10/08/2018.

CSIR and AYUSH, 'Traditional Knowledge Digital Library' (*TKDL*) <http://www.tkdl.res.in/tkdl/langdefault/common/Home.asp?GL=Eng> accessed 09/08/2018.

DSMZ, 'DSMZ is Europe's first Registered Collection' (2017) <https://www.dsmz.de/home/details/entry/dsmz-is-europes-f.html> accessed 06/08/2018.

ECHR, 'Inter-States Applications' (*ECHR*, 2019) <https://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf> accessed 04/05/19.

Haag RD, 'Uitspraken' (*Rechtbank Den Haag*, 07/12/2018) <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2018:13960> accessed 08/05/2019.

HCCH, 'Status Table: Convention of 25 October 1980 on International Access to Justice' (*HCCH*, 2016) <https://www.hcch.net/en/instruments/conventions/status-table/?cid=91> accessed 19/08/2018.

IACHR, 'Statistics' (*IACHR*) <http://www.oas.org/en/iachr/multimedia/statistics/statistics.html> accessed 22/08/2018.

ILO, 'Ratifications of C169' (1991) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314> accessed 08/04/2019.

Laird SA and Wynberg RP, 'CBD Factsheet' (*CBD*, 2012) <https://www.cbd.int/abs/doc/protocol/factsheets/policy/ABSFactSheets-Overview-web.pdf> accessed 14/03/2019.

Morgera E, 'Reflections on 2016 UN Biodiversity Conference (Part II): Assessing the Mo'otz Kuxtal Guidelines on Benefit-sharing from the Use of Traditional Knowledge' (*Benelex*, 2017) 26/08/2017.

OHCHR, 'Human Rights Bodies - Complaints Procedures' (*OHCHR*, 2019) <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#interstate> accessed 04/05/19.

Pain E, 'French Institute Agrees to Share Patent Benefits after Biopiracy Accusations' (2016) <http://www.sciencemag.org/news/2016/02/french-institute-agrees-share-patent-benefits-after-biopiracy-accusations> accessed 06/08/2018.

Rights ACoHaP, 'Contentious Matters' (*ACHPR*, 2018) <http://en.african-court.org/index.php/cases> accessed 22/04/2019.

UEBT, 'Ethical BioTrade Standard' (*UEBT*, 2012) <https://www.ethicalbiotrade.org/setting-the-standard/> accessed 16/08/2018.

——, 'UEBT briefing note on the Nagoya Protocol' (*UEBT*, 2016) <http://ethicalbiotrade.org/dl/benefitsharing/UEBT-ABS-Nagoya-Protocol.pdf> accessed 16/08/2018.

UNDP, 'Access to Justice' (2016) <http://www.undp.org/content/undp/en/home/democratic-governance-and-peacebuilding/rule-of-law--justice--security-and-human-rights/access-to-justice.html> accessed 17/08/2018.

UNECE, ‘Compliance Committee’ (*UNECE*, 2002) <https://www.unece.org/env/pp/cc.html> accessed 17/04/2019.

UNTC, ‘International Convention on the Elimination of All Forms of Racial Discrimination’ (*UN Treaty Collection*, 1966) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en> accessed 11/05/2019.

——, ‘Optional Protocol to the International Covenant on Civil and Political Rights’ (1966) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-5&chapter=4&clang=_en> accessed 22/08/2018.

——, ‘Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (*UN Treaty Collection*, 2008) <https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-3-a&chapter=4&lang=en> accessed 22/08/2018.

WIPO, ‘Disclosure Requirements Table’ (*WIPO*, 2017) <https://www.wipo.int/export/sites/www/tk/en/documents/pdf/genetic_resources_disclosure.pdf> accessed 06/08/2018.